

COMMERCIAL LAW INCLUDING COMPANY LAW AND INDUSTRIAL LAW

BUSINESS LAW

Edited and revised by
Prof. SAKTI MUKHERJEE

**ARUN KUMAR SEN
JITENDRA KUMAR MITRA**

World Press

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By
ARUN KUMAR SEN, M.A. (Cal), M.Sc. (Econ. Lond.)
and
JITENDRA KUMAR MITRA, M.A., LL.B.

Edited and Revised
by

Prof. SAKTI MUKHERJEE
M.A. (Econ.), M.A. (Pol. Sc.), Ph. D. (Econ.),
LL.M. of Calcutta University
Professor, Department of Commerce, Calcutta University

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PREFACE TO THE TWENTY-THIRD EDITION

It gives me great pleasure in placing before the readers The Twenty-Third Edition of this book. When I was requested by The World Press Private Limited authority to take up the charge of revising the present book (after the death of the reputed authors of this book, Profs. Sen and Mitra) I was rather hesitant in accepting this hard task. For, it involved a thorough revision of the book to make it at par with the current trends, especially after so many amendments of the Law in this sphere. But considering the interests of the students in general and academics in particular, I had no other option but to concede to the request of a high hearted person like Sripati Bhattacharjee, the former Managing Director of The World Press Private Limited.

The new edition has been thoroughly revised both in matter of text and updating case materials. It takes full accounts of The Workmen's Compensation (Amendment) Act, 1984, The Factories (Amendment) Act, 1987, The Industrial Disputes (Amendment) Act, 1984, The Payment of Gratuity (Amendment) Act, 1987, The Payment of Bonus (Amendment) Act, 1984, The Employees' State Insurance (Amendment) Act, 1984, The Companies' (Amendment) Act, 1985, The Apprentices (Amendment) Act, 1986, The Companies (Amendment) Act, 1988, The Factories (Amendment) Act, 1988, The MRTP Act, The Industries (development and regulation) Act, 1951 and The Consumer Protection Act. Indeed the Company Law has been completely rewritten in order to make it more comprehensive and exhaustive.

A special care has been taken in this Edition to see that the readers at the primary stage of this study does not find himself lost in the technicalities and niceties of various legal concepts and interpretations. I hope this Edition will continue to help the students in their studies and preparations for higher examinations.

October, 2001

Sakti Mukherjee

PREFACE TO THE FIRST EDITION

The object of this book is to state and explain the leading principles of the branch of law known as Commercial Law..... We have attempted to present the subject as briefly and concisely as possible. Section numbers of the relevant statutes have been mentioned, so that students may find it convenient to refer to them.

We hope the book will make the students acquainted with the subject and will encourage further study.

Our thanks are due to the publishers Sri Prakash Chandra Bhattacharjee and Sri Sripati Bhattacharjee of The World Press and the printers, the Modern India Press for the care and attention with which the work of publication and printing were done.

.....

August, 1956

A.K.S.

J.K.M.

PUBLISHER'S NOTE

Since 1958 the book Commercial Law (including Company Law) and Industrial Law by A. K. Sen and J. K. Mitra is well known to the educational field in India. In absence of the authors the book is thoroughly revised by Prof. Sakti Mukherjee M.A. (Econ.), M.A. (Pol. Sc.), Ph.D. (Econ.), LL.M. of Calcutta University, an experienced and expert professor of Commercial and International Law. Revision has been done according to all current adds and amendments in Commercial and Industrial Law by the Government of India. Hence we believe, the present edition of the book will be more helpful to the students of the subject Commercial and Industrial Law, at the same time, also to the professional examinees and practitioners of the Law.

Our thanks are due to Dr. Mukherjee, for his kind and laborious attention and active stand to make the book up-dated. After all, we hope, the present revised edition will serve the purpose more perfectly.

—Publisher

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INTRODUCTION

Definition of Law 1—Society and Law 2—Rule of Law 3—
Commercial Law and Mercantile Law 6—Sources of Indian
Commercial Law 7

DEFINITION OF LAW

Law, as it is, is the command of the Sovereign. It means, (1) law has its source in sovereign authority, (2) law is accompanied by sanctions, and (3) the command to be a law should compel a course of conduct. Being a command the law must flow from a determinate person or group of persons with the threat of displeasure if it is not obeyed. Sovereignty is, however, only a part of the state. So, in ultimate sense, law emanates from the state. Thus the term Law is used to denote rules of conduct emanated from and enforced by the state. People living in an organised society have to follow certain common rules, otherwise peaceful living is impossible. It is the function of the State to enforce these rules.

Holland

According to Holland¹, Law is, "a rule of external human action enforced by the sovereign political authority". From this definition it follows that there are three essential characteristics of law.

1. Law is a rule relating to the *actions* of human beings.
2. Law attempts to regulate the *external actions* of human beings.
3. Law is enforced by the State.

Salmond

"Law is the body of principles recognised and applied by the State in the administration of justice."²

Woodrow Wilson

Woodrow Wilson³ defines Law as follows : "Law is that portion of the established habit and thought of mankind which has gained distinct and formal recognition in the shape of uniform

¹ Holland, *Jurisprudence*.

² Salmond, *Jurisprudence*.

³ Woodrow Wilson, *The State*

rules backed by the authority and power of the government." This definition is practically the same as that of Holland.

Anson

Rules regarding human conduct are necessary for peaceful living as well as for progress and development. Anson¹ observes as follows : "The object of Law is Order, and the result of Order is that men are enabled to look ahead with some sort of security as to the future. Although human action cannot be reduced to the uniformities of nature, men have yet endeavoured to reproduce by Law something approaching to this uniformity".

SOCIETY AND LAW

The term 'society' is used to mean a community or a group of persons, living in any region, who are united together by some common bond.

A 'common bond' is formed when some uniformity of factors like nearness, nature of the people, habit, custom, inhibition, beliefs, culture, tradition etc. appears. The 'common bond' lead to forming social rules or rules of social behaviour. The rules are made by members of the society. Disobedience of the rules is followed by punishment in the form of social disapproval. There is no positive penalty associated with the violation of social rules except excommunication or ostracism.

But 'law' unlike social rules, is enforced by the State. Law, according to Holland is "a rule of external human action enforced by the sovereign political authority". The objective of law is to bring order in the society with a view to enable its members to progress and develop with some sort of security regarding the future. (See below)

From the above discussion it follows that although custom, usages and traditions indicate a particular social conduct, law or definitive rules are made to ensure the peace and progress of a society.

The State makes laws. Disobedience of State laws involves a penalty which is enforced by the government through the sovereign power of the State. Whatever is not enforceable is not Law. Laws of the State are applicable to all without exception in identical circumstances.

¹ Anson, *Law of Contract*.

Law and Social Objectives

Many jurists and social scientists in 19th century interpret the nature of Law with social perspectives. 'Ancient Law' by Henry Maine, is the pioneering work in this respect. According to him, with social advance, law must be framed and changed on the basis social needs. Social scientists like Emile Durkheim, L. T. Hobhouse, Max Weber, etc., observed that moral values rather than the settlement of disputes of interests should be the objective of Law. According to Rosco Pound, Law is profoundly related to the following three elements : (a) the legal structure of the society (b) constitutional ideals and principles and (c) legal procedure. The nature and the principle of Law of a democratic society must be different from that of an autocratic system. It has been accepted on all hands that Law is today one of the imperative tools for performing social purposes.

Change of Law and Change of Social Rules

The legal system of a country reflects the rules of society. If there is a change of social rules usually there occurs a change of law. For example, in the Middle Ages in Europe, the landlord and the feudal system prevailed. At that time the rights of the peasant was very restricted. In modern times when the feudal system was abolished the rights of the peasant and the citizens were enlarged. Therefore change of social rules leads to change of law.

The converse of the above also applies, i.e., change of law leads to change of the rules of society. Legislation has enlarged the rights of Hindu women regarding inheritance, property rights and marital rights. In these cases the change of law has been accepted by the society. We can conclude that there is a dependence between law and social rules and *vice versa*.

RULE OF LAW

The Concept

In earlier times (and in a few countries now) certain classes and individuals possessed special privileges and were judged by special law. The modern view is to apply the same law over all persons in the State and to give all persons equal rights and privileges for the protection of their human liberties. Democracy can remain only in a society of equals.

Three Rules

The concept of equality of all persons before law is the basis of what is called the Rule of Law. The Rule was summarised by Dicey¹ as follows :

1. The Rule of Law states that, "no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts." (Dicey). In other words, (a) there must be supremacy of law, (b) no one shall be punished except for definite breach of law and (c) the breach of law must be proved in a duly constituted court of law. No citizen can be arrested or imprisoned, unless he violates specifically any law of the country in force and is accused of a charge by the court. Thus the rule of law implies equal protection of law.

2. In the second place, Rule of law means that, "no man is above law". Every man whatever his rank or condition, is subject to the ordinary law of the State and amenable to the jurisdiction of ordinary tribunals. "What is law—legal right and legal obligation for me—must hold equally as such for all citizens." (Dicey). In other words, Rule of Law means (a) equality before the law, (b) every citizen is subject to the ordinary law of the land and (c) the citizen has to face trial in the same law courts, irrespective of his status or position in the society.

3. In the third place, the Rule of Law is the result of statutes and judicial decisions determining the rights of private persons. Thus the constitutional law of the country follows from the ordinary law of the land.

Comments

The Rule of Law is therefore, no respecter of persons. It is applicable to everybody (from Prime Minister to the convict, and from the millionaire to a beggar). The judiciary must be independent and impartial if the Rule of Law can mean anything real.

Unlike the Indian Constitution, the British Constitution has developed through historical evolution on the basis of common law. The rights of citizens of England are not written in a special document (like Fundamental Rights or a Bill of Rights). They are specified in common law. If an ordinary citizen, or the sovereign power interferes with the legal right of a citizen, the

¹ A. V. Dicey, *Law of the Constitution*.

remedy is to be sought with the help of common law. Therefore, Dicey observes that the rights of the citizens have been protected by the ordinary law of the country and the Rule of Law. In India, however, there is a written constitution specifying the Fundamental Rights of a citizen.

Criticism

The three principles, which Dicey described in relation to the Rule of Law, have been criticised by many jurists, including I. Jennings, H. Laski and W. A. Robson. The main criticisms are summarised below :

1. *The emergence of Administrative Law* : With the increase of constitutional complexities, the government departments have made many rules framed under various acts. This is known as Administrative Law. There are also special tribunals for the settlement of professional disputes. At the time of Dicey (19th century Great Britain) there existed separate military courts and courts for churchmen. The executive department often uses the arbitrary and prerogative powers in day-to-day's work and for the purpose of performing the administrative work applies the discretionary power in most cases. Therefore, it is apparent that the Rule of Law is breached and the power of the government is far-reaching.

2. *Economic Inequalities* : In order to ensure legal equality Prof. Laski emphasises the need of economic equality. Punishment for the same offence varies because police enforcement is frequently partial. Therefore, from the standpoint of law, the word 'equality' is meaningless, unless there is economic equality followed by Social and constitutional equality.

3. *The supremacy of the Legislature* : The third principle of the Rule of Law is the supremacy of common law. But, in fact, the principal basis of the constitution of England is the supremacy of Parliament. The sovereignty of Parliament in Britain has not been established by the Court. Although the Fundamental Rights of a citizen are established upon the basis of conventional rules and the Court is the protector of those rights, yet Parliament of Britain is the sole authority to bring any change over or to nullify the existing rules. Therefore, it is understood that Parliament is the fundamental basis of the Constitution of England and judging from the standpoint of modern age, the concept of the Rule of Law is only a theoretical

idea. This, however, does not apply to India because the constitution of India is written and there is a provision of fundamental rights in the constitution.

Conclusion

The principle of Rule of Law has been criticised from three viewpoints, viz., (i) the extensive power of Administrative Law, (ii) inequality of income/wealth and (iii) supremacy of the legislature. In spite of these defects, a civilised state must secure the Rule of Law. Otherwise, despotism, authoritarianism and corruption will hold sway on the state. Democracy can be attained only under the Rule of Law. Conversely Rule of Law can be attained only in democracy.

The Rule of Law has many benefits. It protects the liberty and rights of citizens. The Rule of Law creates an atmosphere of peaceful living. This principle, with true education enhances the calibre of citizens, legislators, and voters, thus enabling them to maintain Rule of Law free from its defects and designs of self-seeking persons.

COMMERCIAL LAW OR MERCANTILE LAW

Definition

The laws of a country relate to many subjects, e.g., inheritance and transfer of property, relationship between persons, crimes and their punishment, as well as matters relating to industry, trade and commerce. The term Commercial Law or Mercantile Law is used to include only the last of the aforesaid subjects, viz., rules relating to industry, trade, and commerce.

Commercial Suit

A suit between merchants, bankers, and traders, relating to mercantile transactions is a commercial suit. It follows that all laws which must be referred to in order to decide such suits come within the scope of commercial law. Commercial law or mercantile law may therefore be defined as *that part of law which regulates the transactions of the mercantile community.*

Scope

The scope of commercial law is large. It includes the laws relating to contract, partnership, negotiable instruments, sale of goods, companies etc.

It must be noted that there is no fixed line of division between commercial law and other branches of law, nor is there any conflict or contradiction between them. The law of contract, which is a very important part of commercial law, is applicable not only to merchants and bankers but also to other persons. When a merchant files a suit in a court of law the procedure is not materially different from that of other suits. When a trader commits an offence he is punishable under the criminal law exactly in the same way as any other person. The subjects studied under the heading of commercial law do not form a comprehensive code dealing with all aspects of mercantile activity. Commercial law deals with only those parts of law which are of special importance to the mercantile community. The same laws are applicable to other citizens under appropriate circumstances.

SOURCES OF INDIAN COMMERCIAL LAW

The commercial law of India is based upon statutes of the Indian legislature, English mercantile law and Indian mercantile usages, modified and adapted by judicial decisions.

We are stating below the sources from which the rules of Commercial Law of India have been derived.

1. Statutes of the Indian Legislatures

The legislature is the main source of law in modern times. In India, the Central and the State legislatures possess law making powers and have exercised their powers extensively. The greater part of Indian commercial law is statutory.

2. English Mercantile Law

Many rules of English Mercantile Law have been incorporated into Indian Law through statutes and judicial decisions. English Mercantile Law is a mixture of diverse elements. It contains rules originating from the following sources :

- (i) Maritime usages which developed during the 14th and the 15th centuries among merchants trading in the European ports. These usages are known as *Lex Mercatoria*.
- (ii) Rules which developed by custom in England and which constitute what is called the English Common Law.
- (iii) Rules of Roman Law.

- (iv) Rules of Equity, *i.e.*, rules which were applied by English Courts of Equity in cases where the common law rules were considered harsh and oppressive.
- (v) Statutes of the British Parliament.

3. Judicial Decisions or Precedents

Judges interpret and explain statutes. Rules of equity and good conscience are incorporated into law through judicial decisions. Whenever the law is silent on a point, the judge has to decide the case according to his idea of what is equitable. Prior to 1947, the Judicial Committee of the Privy Council of Great Britain was the final court of appeal for Indian cases and its decisions were binding on Indian courts. After, independence, the Supreme Court of India is the final court of appeal. But decisions of the superior English courts like the Courts of Appeal, Privy Council, and the House of Lords, are frequently referred to as precedents which might be followed in interpreting Indian statutes and as rules of equity and good conscience.

4. Custom and Usage

A customary rule is binding where it is ancient, reasonable, and not opposed to any statutory rule. A custom becomes legally recognised when it is accepted by a court and is incorporated in a judicial decision.

EXERCISES

1. Define 'Law' and discuss the theory of 'Rule of Law'. (Pages 1, 3-5)
2. "Change of Law depends upon the change of society". Discuss. (Pages 2-4)
3. What do you understand by Rule of Law? What are the benefits of Rule of Law? (Pages 3-5)
4. "All are equal in the eyes of law". Discuss. (Pages 3-5)
5. Discuss the relationship between Law and Society. (Pages 1-3)
6. What are the sources of Commercial Law in India? (Page 6)
7. Objective questions. Give short answers.
 - (i) Summarise the Rule of Law in seven lines. (Pages 3-5)
 - (ii) What good law does to the society? (Page 1)

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1

THE ESSENTIAL ELEMENTS OF CONTRACT

Object and Scope

The Law of Contract deals with agreements which can be enforced through courts of law.

(The Law of Contract is the most important part of commercial law because every commercial transaction starts from an agreement between two or more persons.)

According to Salmond¹ a contract is "an agreement creating and defining obligations between the parties." According to Sir William Anson², "A contract is an agreement enforceable at law made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others."

The object of the Law of Contract is to introduce definiteness in commercial and other transactions. How this is done can be illustrated by an example. *X* enters into a contract to deliver 10 tons of coal of *Y* on a certain date. Since such a contract is enforceable by the courts, *Y* can plan his activities on the basis of getting the coal on the fixed date. If the contract is broken, *Y* will get damages from the court and will not suffer any loss.

Sir William Anson observes as follows : "As the law relating to property had its origin in the attempt to ensure that what a man has lawfully acquired he shall retain, so the law of contract is intended to ensure that what a man has been led to expect shall come to pass ; and that what has been promised to him shall be performed."

Application

The Indian Contract Act of 1872 (Act IX of 1872) lays down certain general rules regarding contracts. The Act is not exhaustive. There are other Acts relating to particular types of contracts. e.g., the Negotiable Instruments Act, the Transfer of Property Act, etc.

¹ Salmond, *Jurisprudence*.

² Anson, *Law of Contract*.

The Contract Act does not affect any usage or custom of trade, or any incident of any contract not inconsistent with the provisions of the Act.—Sec. 1.

Definition of Contract

Section 2(h) of the Indian Contract Act provides that, "An Agreement enforceable by law is a contract". Therefore in a contract there must be (1) an agreement and (2) the agreement must be enforceable by law.

An *agreement* comes into existence whenever one or more persons promise to one or others, to do or not to do something, "Every promise and every set of promises, forming the consideration for each other, is an agreement—Sec. 2(e). Some agreements cannot be enforced through the courts of law, e.g., an agreement to play cards or go to a cinema. An agreement, which can be enforced through the courts of law, is called a *contract*.

The Essential Elements of a Contract

An agreement becomes enforceable by law when it fulfils certain conditions. These conditions, which may be called the Essential Elements of a Contract, are explained below.

1. *Offer and Acceptance* : There must be a lawful offer by one party and a lawful acceptance of the offer by the other party or parties. The adjective "lawful" implies that the offer and acceptance must conform to the rules laid down in the Indian Contract Act regarding offer and acceptance. (See ch. 2)

2. *Intention to create Legal Relationship* : There must be an intention (among the parties) that the agreement shall result in or create legal relations. An agreement to dine at a friend's house is not an agreement intended to create legal relations and is not a contract. But an agreement to buy and sell goods or an agreement to marry, are agreements intended to create some legal relationship and are therefore contracts, provided the other essential elements are present. (See ch. 3)

3. *Lawful Consideration* : Subject to certain exceptions, an agreement is legally enforceable only when each of the parties to it gives something and gets something. An agreement to do something for nothing is usually not enforceable by law. The something given or obtained is called consideration. (See ch. 4)

The consideration may be an act (doing something) or forbearance (not doing something) or a promise to do or not to do something. Consideration may be past (something already done or not done). It may also be present or future. But only those considerations are valid which are "lawful". (What is meant by "lawful consideration" is discussed in ch. 8)

4. *Capacity of Parties* : The parties to an agreement must be legally capable of entering into an agreement, otherwise it cannot be enforced by a court of law. Want of capacity arises from minority, lunacy, idiocy, drunkenness, and similar other factors. If any of the parties to the agreement suffers from any such disability, the agreement is not enforceable by law, except in some special cases. (See ch. 6)

5. *Free Consent* : In order to be enforceable, an agreement must be based on the free consent of all the parties. There is absence of genuine consent if the agreement is induced by coercion, undue influence, mistake, misrepresentation, and fraud. A person guilty of coercion, undue influence etc. cannot enforce the agreement. The other party (the aggrieved party) can enforce it, subject to rules laid down in the Act. (See ch. 7)

6. *Legality of the Object* : The object for which the agreement has been entered into must not be illegal, or immoral or opposed to public policy. (See ch. 8)

7. *Certainty* : The agreement must not be vague. It must be possible to ascertain the meaning of the agreement, for otherwise it cannot be enforced. (See ch. 8)

8. *Possibility of Performance* : The agreement must be capable of being performed. A promise to do an impossible thing cannot be enforced. (See ch. 8)

9. *Void Agreements* : An agreement so made must not have been expressly declared to be void. Under Indian Contract Act there are five categories of agreements which are expressly declared to be void. They are :

1. Agreement in restraint to marriage. (Sec. 26)
2. Agreement in restraint of trade. (Sec. 27)
3. Agreement in restraint of proceedings. (Sec. 28)
4. Agreements having uncertain meaning. (Sec. 29)
5. Wagering agreement. (Sec. 30)

10. Writing, Registration and Legal Formalities : An oral contract is a perfectly good contract, except in those cases where writing and/or registration is required by some statute. In India writing is required in cases of lease, gift, sale and mortgage of immovable property : negotiable instruments ; memorandum and articles of association of a company etc. Registration is compulsory in cases of documents coming within the purview of Section 17 of the Registration Act, e.g., mortgage deeds covering immovable property. The terms of an oral contract are sometimes difficult to prove. Therefore important agreements are usually entered into in writing even in cases where writing is not compulsory.

Conclusion

The elements mentioned above must *all* be present. If any one of them is absent, the agreement does not become a contract. An agreement which fulfils all the essential elements is enforceable by law and is called a contract. From this it follows that, *every contract is an agreement but all agreements are not contracts.*

Every contract gives rise to certain legal obligations or duties on the part of the contracting parties. The legal obligations are enforced by the courts.

The Indian Contract Act contains rules regarding each of the elements mentioned above. These rules are discussed in the subsequent chapters.

SOME DEFINITIONS

In the Law of Contract certain terms are used indicating their meaning. The terms also show that contracts can be classified into four broad divisions, namely, (1) the method of formation of a contract, (2) the time of its performance, (3) its parties, and (4) its legality or validity.

I. Method of Formation

(1) Express Contract

Express Contract is one which is expressed in words spoken or written. When such a contract is formed, there is no difficulty in understanding the rights and obligations of the parties. (See pp. 18-19)

(2) Implied Contract

The conditions of an implied contract is to be understood from the acts, the conduct of the parties and/or the course of dealing between them. (See pp. 18-19)

(3) Quasi Contract

There are certain dealings which are not contracts strictly, though the parties act as if there is a contract. The Contract Act specifies the various situations which come within what is called Quasi Contract. (Sections 68-72; see Chapter 12 Book I)

II. *The Time of Performance***(1) Executed Contract**

There are contracts where the parties perform their obligations immediately, *i.e.*, as soon as the contract is formed. (See pages 35-36)

(2) Executory Contract

In this contract the obligations of the parties are to be performed at a later time. (See p. 36)

III. *The Parties of the Contract***(1) Bilateral Contracts**

There must be at least two parties to the contract. Therefore all contracts are bilateral or multilateral. (See p. 15)

(2) Unilateral Contract

In certain contracts one party has to fulfil his obligations whereas the other party has already performed his obligations. Such a contract is called unilateral contract.

IV. *Legality or Validity of the Contract*

Contracts can be classified into the following : (1) valid, (2) void, (3) voidable, (4) illegal and (5) unenforceable. These terms are explained in Chapter 5, Book I.

EXERCISES

1. Explain the essential elements of a contract. (Pages 13-14)
2. Define contract. State the essential elements of contract. (Pages 12-13)
3. "All agreements are not contracts, but all contracts are agreements". Discuss the statement explaining essential elements of a valid contract. (Pages 13-14)

DEFINITIONS**Formation of Contract**

All contracts are made by the process of a lawful offer by one party and the lawful acceptance of the offer by the other party. *X* says to *Y*, "Will you buy my house for Rs 50,000?" This is an offer. If *Y* says, "Yes", the offer is accepted and a contract is formed.

Proposal

An "offer" involves the making of a "proposal". The term proposal is defined in the Contract Act as follows : "When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal" —Sec. 2(a).

Offer

A proposal is also called an offer. The promisor or the person making the offer is called the offeror. The person to whom the offer is made is called the offeree.

Promise and Acceptance

"When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted becomes a promise."—Sec. 2(b).

"The person making the proposal is called the 'promisor' and the person accepting the proposal is called the 'promisee'." —Sec. 2(c).

Examples of offer and acceptance :

- (i) *Specific Offer* : *X* offers to sell his motor car to *Y* at the price of Rs. 5000. This is a proposal. *X* is the promisor or the offeror. *Y* is the offeree. If *Y* agrees to buy the car at the price stated ; *Y* becomes the promisee or the acceptor. There is a contract.
- (ii) *Specific Offer* : *P* puts up a notice offering to pay a reward of Rs. 5 to any student who finds out and returns a book lost in the college. *Q* a student, reads the notice and then finds and brings the book to *P*. *P*'s notice is an offer and *Q* is the acceptor. There is a contract.

- (iii) *General Offer* : A transport company runs tramway cars along the streets. This is an offer by the company to carry passengers at the scheduled fares. The offer is accepted when a passenger gets up on a tram with the intention of becoming a passenger.

EFFECT OF OFFER AND ACCEPTANCE

Offer alone and acceptance alone are "inactive", "inert" or "powerless". When separate they cannot lead to the formation of a contract. But an offer *together with* acceptance leads to a contract which is enforceable by the Court, provided the other essential elements of contract exist.

The formation of a contract can be illustrated by the famous 'gunpowder and lighted match' simile of Anson. The materials in a gunpowder (like sulphur, iron fillings, etc.) by themselves are not enough to cause an explosion. But when a lighted match is applied to the inflammable mixture, an explosion occurs. Similarly, offer and acceptance together can explode leading to the formation of a valid contract. But if there is any disqualification on the part of either offer or acceptance, no contract will be formed just as if a gunpowder lacks sulphur or a lighted match is damp no explosion will occur. The idea being clear, we can recall the original saying. "Acceptance is to offer what a lighted match is to a train of gunpowder. It produces something which cannot be recalled or undone. But the powder may have lain till it has become damp or the man who laid the train may remove it before the match is applied. So an offer may lapse for want of acceptance or be revoked before acceptance. Acceptance converts the offer into a promise and then it is too late to remove it." (Anson)

OFFER

Rules regarding offer

The Contract Act contains various rules regarding offer or proposal. They can be summed up as follows :

1. *An offer may be express or may be implied from the circumstances* : An offer may be made in two ways : (i) by words, spoken or written and (ii) by conduct. When an offer is made by stating so in words or in writing, it is called an **Express offer**. When an offer is implied from the conduct of a person, it is called an **Implied offer**. Examples (i) and (ii) in the last

page, are cases of express offer. Example (iii) is a case of an implied offer. (See p. 18)

"In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied"—Sec. 9.

2. *An offer may be made to a definite person ; to some definite class of persons ; or to the world at large* : An offer made to a definite person or a definite class of person is called a **Specific offer**. An offer sent to all persons (or the world at large) is called a **General offer**. Example (i) is an offer to a definite person ; example (ii) is an offer to a definite class of persons ; and example (iii) is an offer to the world at large. (See pp. 17-18)

3. *Legal relationship is required* : The offer must be one which is capable of creating a legal relationship. A social party or an invitation to play cards is not a legal relationship. Therefore, an offer to such an affair does not lead to a binding contract. (See chapter 3, Part I, p. 33)

4. *The terms of the offer must be certain, definite, unambiguous and not vague* : X says to Y, "I will give *some* money if you marry Z". This is not an offer which can be accepted because the amount of money to be paid is not certain.

5. *A mere statement of intention is not an offer* : A distinction is usually made, between an "offer" and "a statement of intention". Price-lists and catalogues, and enquiries for customers are merely statements of intention. They are not regarded as offers but as *invitation* to others to make offers. An advertisement in a newspaper or elsewhere may be so worded that it amounts to an offer. But ordinarily advertisement is considered to be an invitation to make offers. Similarly, in an auction sale, articles are displayed with an intention that the bidders present may bid for them i.e. may make an offer. Thus in an auction sale a bid is an offer while the fall of the hammer signifies the acceptance of the auctioneer. (*Payre v. Cave*)

Examples :

- (i) *Intention to sell* : A label on an article in a shopkeeper's showcase stating 'price Rs. 5' is considered to be the expression of an intention to sell the article at Rs 5. It is not an offer to the world at large which can be accepted by anybody. The intending purchaser who wishes to buy the article is the proposer. The shopkeeper may

or may not accept the proposal. The same rule applies to price-list and catalogues. *Fisher v. Bell*.¹

- (ii) *Quotation of prices* : A quotation of prices is not an offer, but an invitation for offers. *Mylappa Chettiar v. Aga Mirza Mohamed Shirazee*.² This is true of many common forms of advertisement.
- (iii) *Advertisements* : A newspaper advertisement inviting applications for a job or inviting tenders for some work is not an offer. It is only an invitation to make offers. The applicants who reply to the advertisement are the proposers or offerors. The advertiser is free to accept any one of the applications.
- (iv) *Catalogue* : A banker's catalogue of charges is not an offer. *Bank of Travancore v. Dhirt Ram*.³
- (v) *Time-table* : A railway time-table is not an offer. Therefore if a train does not work according to the table, the ticket-holder cannot file a case for breach of contract.
- (vi) *Question and Reply* : *H* telegraphed to *F* asking the latter to inform him whether he would sell Bumper Hall Pen and if so at what price. *F* informed *H* that the lowest price was £900 but did not say that he was willing to sell at that price. *H* telegraphed that he would buy at that price. *F* gave no reply to the telegram. Held, there was no contract because neither the question of *H* nor the reply of *F* constituted an offer. *Harvey v. Facey*.⁴
- (vii) *Auction* : When particular goods are advertised for sale by auction the auctioneer does not contract any one who attends the sale intending to purchase those goods that they shall be actually put up for sale. *Harris v. Nickerson*.⁵

6. *An offer must be communicated to the offeree* : A person cannot accept an offer unless he knows of the existence of the offer. *P* offers a reward to anyone who returns his lost dog. *Q* finding the dog brings it to *P* without having heard of the offer. Held, he was not entitled to the reward. *Fitch v. Snedaker*.⁶ In this case it was argued that a man cannot accept an offer without intending to do so, and he cannot intend to accept an offer of which he was ignorant. In *Lalman v. Gauri Dutt*,⁷ *G* sent his servant *L* in search of his missing nephew. Subsequently *G* announced a reward for information concerning the boy. *L* brought back the missing boy, without having known of the reward. Held, there was no contract between *L* and *G* and the reward cannot be claimed.

[Communication of Offer and Acceptance.—See p. 26]

¹ (1961) 1 Q. B. 394

³ AIR (1942) Privy Council 6

⁵ (1873) L. R. 8 Q. B. 286

⁷ 11 A. L. J. 489

² (1919) 37 Mad. L.J. 712

⁴ (1893) A. C. 552

⁶ 30 N. Y. 248

7. *An offer may be conditional* : An offer may be made subject to conditions. In such cases, the conditions must be clearly communicated to the offeree. If a person accepts an offer without knowledge of the conditions, the offeror cannot claim fulfilment of the conditions. But if the conditions are clearly written or expressed and should have been known to the offeree, he cannot plead ignorance of the conditions.

Examples :

- (i) *Strict enforcement* : *X* agreed to buy goods from *Y* and signed an order form given by *Y* containing a number of clauses in small print, without reading them. Held, clauses were binding on *X*. *L'Estrange v. Graucob Ltd.*¹
- (ii) *Strict enforcement* : *T*, who could not read, took an excursion ticket on the railway. On the front of the ticket was printed "for conditions see back". One of the conditions was that the railway company would not be liable for personal injuries to passengers. *T* was injured by a railway accident. Held, *T* was bound by the conditions and could not recover any damages. *Thomson v. L. M. & S. Rly.*²
- (iii) *No reasonable notice* : *R* booked her passage on a ship and received a ticket folded in such a way that no writing was visible. On the ticket were printed certain conditions in small type, one of which was that the shipowner's liability was limited to £100. *R* knew that there was printing on the ticket but did not know that the printing related to conditions of the contract. Held, *R* was not bound by the conditions as she did not know of their existence, and having regard to the smallness of the type in which they were printed, the absence of calling of attention to them, the shipowner had not given reasonable notice of them. *Richardson v. Rawntree.*³
- (iv) *Against public interest* : *M* delivered one new sari to a laundry for washing. On the back of the printed receipt it was stated that the customer would be entitled to recover only 15% of the market-price of the article in case of loss. The sari was lost owing to the negligence of the laundry. In a suit by *M* it was held that the term was unreasonable. Such a term would give a premium on dishonesty and is against the public interest. *Lily White v. R. Munnuswami.*⁴
- (v) *Unreasonable* : In a Karnataka case, a laundry would pay only 8% of the price in case of loss. The court held that the term was unreasonable. *M. Siddalingappa v. T. Nataraj.*⁵

Comments : A contract formed on a *conditional offer* is valid. The terms of the contract can be constructed strictly or

¹ (1934) 2 K. B. 394

² (1930) 1 K. B. 41

³ (1894) A. C. 217

⁴ AIR (1966) Mad 13

⁵ AIR (1970) Mys 154

leniently. Formerly, all contracts were constructed and enforced strictly. See examples (i) and (ii), above. In recent times, however, the courts have adopted various protective measures for the aggrieved persons. Conditional offers are invalid under the following circumstances :

- (1) Lack of reasonable notice. Example (iii)
- (2) Unreasonable terms. Example (iv) and (v)
- (3) Breach of fundamental rights.
- (4) Tortious action by offeror.

8. *Printed Contracts* : Printed Contracts (or Standard Forms of Contracts) often contain a large number of terms and conditions which exclude liability under the contract. For examples, the Life Insurance Corporation of India, the Railway Administration, Statutory Corporation and big companies issue printed forms of contract. The individual is bound to sign them whether he likes the terms or not. Previously, the offerees of such printed forms were helpless against the massive organisations like those above. These organisations have availed of the opportunity to exploit the weak individual by imposing onerous terms upon them. Therefore, nowadays in order to protect the oppressed individual the courts have evolved various modes of protection. (See last para)

ACCEPTANCE

Who can accept ?

An offer can be accepted only by the person or persons for whom the offer is intended. An offer made to a particular person can only be accepted by him because he is the only person intended to accept. An offer made to a class of persons can be accepted by any member of that class. An offer made to the world at large can be accepted by any person whatsoever. *X* sold his business to *Y* without disclosing the fact to his customers. *Z* sent an order for goods to *X* by name. *Y* received it and sent a letter of acceptance. Held, there was no contract between *Y* and *Z* because *Z* never made any offer to *Y*. *Boulton v. Jones*.¹

¹ (1857) E. R. 232

Rules regarding acceptance

The acceptance of an offer to be legally effective must satisfy the following requirements :

1. *It must be an absolute and unqualified acceptance of all the terms of the offer.*—Sec 7(1). If there is any variation, even on an unimportant point, between the terms of the offer and the terms of the acceptance, there is no contract.

Examples :

(i) *M* offered land to *N* at £280. *N* replied accepting and enclosing, £80, and promising to pay the balance by monthly instalments of £50. Held, there was no contract, as there was no unqualified acceptance. *Neale v. Merrett*.¹

(ii) *P* offered to buy *Q*'s mare on *Q* giving a guarantee that the mare was quite in harness. *Q* guaranteed that the mare was "quiet in double harness". Held, no acceptance. *Jordan v. Norton*.²

2. *Conditional Acceptance* : In accordance with English law as well as with the terms of the Contract Act, an acceptance with a variation is no acceptance ; it is simply a counter-proposal, which must be accepted by the original promisor before a contract is made. *X* offered to sell his house for Rs. 12,000. *Y* said, "accepted for Rs. 10,000." This is not an acceptance but a counter offer or counter proposal. *Kundan Lal v. Secretary of State*³ ; *Hyde v. Wrench*.⁴

But an acceptance is not called 'conditional' if an immaterial term is added or if there occurs any misunderstanding between the parties for the interpretation of collateral terms.

3. *Contracts subject to condition* : There are cases where an "immediate binding contract is formed although some of the parties' rights and obligations may be dependent upon the happening of a particular event. For example, the agreement may contain such a term as 'subject to the purchaser's solicitors approving the title.' *Smith v. Butler*.⁵ (Anson—*Law of contract*, p. 54)

4. *Clarification* : The seeking clarification of offer neither amounts to the acceptance of the offer nor to the making of a counter offer. Cheshire and Fifoots' *Law of Contracts*, 9 Edn.

¹ (1930) W. N. 189

² (1838) 4 M. & W. 155

³ (1939) 14 Luck, 710

⁴ (1840) 3 Bev. 334

⁵ (1900) 1 Q. B. 694

p. 34 ; *U. P. State Electricity Board and another v. M/s Goel Electric Stores, Chandigarh*.¹

5. *The acceptance must be expressed in some usual or reasonable manner* :—Sec 7(2). The offeree may express his acceptance by word of mouth, telephone, telegram or by post. These are the usual methods of communicating acceptance to the offeror. [Communication.—See p. 26]

An offer may also be accepted by conduct. If the offeree does what the offeror wants him to do, there is acceptance of the offer by conduct. Section 8 of the Act states that, "Performance of the conditions of a proposal or the acceptance of any consideration for reciprocal promise which may be offered with a proposal, is an acceptance of the proposal."

Examples :

- (i) *Oral or by writing.* P offers to buy Q's bicycle at Rs. 50. Q may accept this offer by stating so orally or through telephone or by writing a letter or by sending a telegram to that effect.
- (ii) *Conduct.* A company offered £100 to anyone who contracted influenza after using their smoke ball 3 times daily for 2 weeks. Mrs. Carlill used the smoke ball but nevertheless got influenza. She claimed the reward. The company objected, that she should have notified them for her acceptance of the offer. Held, the use of the smoke ball by Mr. Carlill constituted acceptance of the offer by conduct, and no formal notice of acceptance was necessary. *Carlill v. Carbolic Smoke Ball Company*.²
- (iii) *Conduct.* A widow invited her niece to stay with her in her residence and promised to settle on her a particular immovable property. The niece stayed with her in residence till her death. Held, (by the Privy Council) that the niece was entitled to the property because she had accepted the aunt's offer by going to her residence and staying with her as desired. *V. Rao v. A Rao*.³

6. *Mental acceptance or uncommunicated assent does not result in a contract* : No contract is formed if the offeree remains silent and does nothing to show that he has accepted the offer. Acceptance must be communicated to the offeror or shown by conduct.

Acceptance cannot be implied from silence of the offeree. See example (iii).

¹ AIR (1977) All 494

² (1893) 1 Q. B. 256

³ (1916) 39 Mad 509 (Privy Council)

Examples :

- (i) *F* offered to buy *B*'s horse for £30, saying, "If I hear no more about him I shall consider the horse as mine at £30." *B* did not reply. Held, there was no contract because there was no communication of acceptance. Mental acceptance or uncommunicated assent does not result in a contract. *Felthouse v. Bindley*.¹
- (ii) A person received an offer by letter ; he wrote on the letter "accepted", put the letter in his drawer and forgot all about it. Held there was no contract because the other party was not informed. *Brogden v. Metropolitan Rly Co.*²
- (iii) *Insurance proposal* ; Acceptance is complete only when it is communicated to the offeror. Silence or receipt and retention of premium cannot be construed as acceptance. *Life Insurance Corporation of India v. Raja Vasireddy Komalavalli Kamba and others.*³ (See Law of Insurance, ch. 1)

7. The mode of acceptance : Where the promisor prescribes a particular mode of acceptance, the offeree must follow the particular mode of acceptance. For example, if the offeror says, "acceptance to be sent by telegram", the offeree must send a telegram. If the offeree fails to follow the prescribed mode of acceptance, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that the proposal be accepted in the prescribed manner and not otherwise. But if the proposer does not insist upon it, he accepts the acceptance as actually communicated.—Sec 7(2). Thus, under the Indian law the proposer has the option of waiving compliance with the prescribed mode of acceptance.

Example :

X offers to buy a certain quantity of coal from *Y* at a certain price and asks *Y* to send a telegram if he accepts, *Y* writes a letter accepting the offer. *X* may insist on a telegram from *Y* ; but if *X* does not so insist, the acceptance is good.

8. Time of Acceptance : (If the offeror prescribes a time, the acceptance must be done within that time. If no time is prescribed the acceptance must be done within *reasonable time*.) What is 'reasonable' depends on the facts of the case. See the Case of *Ramsgate Victoria Hotel Co. v. Montefiore* (Page 29).

9. When acceptance is complete : Section 4 of the Contract Act lays down that the communication of an acceptance is

¹ (1862) 11 C.B.N.S. 869² (1877) A.C. 666³ AIR (1984) Supreme Court 1014

complete,—as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor; and as against the acceptor, when it comes to the knowledge of the proposer.

Examples :

- (i) *A* proposes, by letter, to sell a house to *B* at a certain price. The communication of the proposal is complete when *B* receives the letter.
- (ii) *B* accepts *A*'s proposal by a letter sent by post. The communication of the acceptance is complete—as against *A*, when the letter is posted, as against *B*, when the letter is received by *A*.

10. *Before Offer* : Acceptance must be given before the offer. This is the natural sequence. There cannot be acceptance before the offer is given from any person. See the case of *Lalman v. Gauri Dutt*. (Page 20)

11. *The acceptance must be made while the offer is in force*, i.e., before the offer has been revoked or the offer has lapsed. How an offer is revoked is described below. (See page 29).

COMMUNICATION OF OFFER AND ACCEPTANCE

Section 3 of the Contract Act states as follows : The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking by which he intends to communicate such proposal, acceptance or revocation or which has the effect of communicating it.

How is an Offer to be Communicated ?

An offer may be communicated to the offeree or offerees by word of mouth, by writing or by conduct. A written offer may be contained in a letter or a telegram. A circular or advertisement or a notice may be written in such a language that it amounts to an offer. A tramway car and a bus going along a street and picking up passengers are examples of offers by conduct.

Section 4 states : "The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made."

How is an acceptance to be Communicated ? (See p. 23)

Offer and Acceptance by Post

An offer may be made by post. An offer may also be accepted by post, if there is no other mode of acceptance specially prescribed by the proposer. When a proposal is made through the post, the post office is by implication the *agent* of the proposer. Therefore a letter of acceptance duly addressed and posted is sufficient acceptance even though the letter does not actually reach the proposer. (Notice to an agent is considered to be notice to the principal). The letter must, however, be correctly addressed. The letter must be actually posted. It is not enough to give it to somebody to post. See example (ii) in para 9, p. 25.

Examples :

- (i) G applied for shares in a company. A letter of allotment was posted but the letter did not reach G. Held there was a binding contract and G was a shareholder of the company. *Household Fire Insurance Co. v. Grant*.¹
- (ii) A registered envelope was tendered by the postman to the addressee, who refused to accept it. It is to be presumed that the addressee has the knowledge of the content thereof. *Har Charn Singh v. Shiv Rani and Others*.²

Offer and Acceptance through Telephone

Offer and acceptance can be communicated through the telephone. But there are certain rules regarding oral communication. It has been held that the offer and acceptance must be *audible, heard and understood*. If these conditions are satisfied and the other essential elements of contract exist, the parties are bound through a telephone conversation. The High Court judgment about this matter is quoted below. "Now, when the parties negotiate a contract orally in the presence of each other or over telephone and one of them makes an oral offer to the other, it is plain that an oral acceptance is expected, and the acceptor must ensure that his acceptance is audible, heard and understood by the offer. The acceptance in such a case must be by such words which have the effect of communicating it." *Kanhaiyalal v. Dineshwar Chandra*.³

¹ (1877) 4 Ex. D. 216

² AIR (1981) Supreme Court 1284

³ AIR (1959) M P 234

In an English court it was held that a communication, sent through a telex or a teleprinter machine in the office, is valid. A contract made by "telex" was no exception to the general rule that acceptance is not complete until communicated. *Entores Ltd. v. Miles Far Eastern Corporation*.¹

Microphone

There was an auction sale of plots of land. The terms, including certain restrictive conditions, were announced by a microphone. The Supreme Court held, "Microphones have not yet acquired notoriety as carriers of binding representations. Promises held out over loudspeakers are often claptraps of politics." *Banwari Lal v. Sukhdarshan Dayal*.²

OPTIONS

An option is a conditional contract to do something. Suppose that *P* the owner of a house, agrees in consideration of Rs. 200, to give *Q* an option to buy the house within six months at a certain price. This is a contract binding upon *P* to allow *Q* to purchase the house at the agreed price at any time within six months. A promise to keep an offer open to acceptance for a certain time is not binding on the proposer unless there is a consideration separately given for that promise, as in the example given above.

STANDING CONTRACT AND OPEN PROPOSALS

Contracts for the supply of goods over a period of time are some times so worded that the buyer has an option as regards the quantity to be purchased and the time of purchase. Such contracts are called "Standing Contracts" or "Open Proposals".

Examples :

P signed a tender addressed to the London County Council, agreeing, on acceptance, to supply all the goods specified in the schedule, to the extent ordered. The tender was accepted but the L. C. C. did not order any goods. Held, the L. C. C. was not bound to order any goods, but if it did so, *P* was bound to deliver the goods as and when ordered. *Percival Ltd. v. L.C.C.*³

In such cases as above, a contract comes into existence when a definite quantity is ordered. *Bengal Coal Co. v. Wadia*.⁴

¹ (1955) 2 Q. B. 327

³ (1918) 87 L.J.K.B. 677

² (1973) ISCC 2941 (Supreme Court)

⁴ (1900) 24 Bom 97

REVOCATION

Revocation of an Offer. When does an Offer Lapse ?

An offer comes to an end, and is no longer open to acceptance under the following circumstances.—Sec 6.

1. By notice

If the offeror gives notice of revocation to the other party, *i.e.*, expressly withdraws the offer, and the offer comes to an end. An offer may be revoked any time before acceptance but not afterwards. Once an offer is accepted there is a binding contract. The acceptance of an offer becomes binding on the offeror as soon as the acceptance is put in course of communication to the offeror so as to be out of the power of the acceptor. But any time before this happens the offer may be revoked. A proposal is sent by *X* to *Y* and is accepted by *Y* by letter. The proposal might have been revoked any time before the letter of acceptance was posted but it cannot be revoked after the letter is posted.

The notice of revocation does not take effect until it comes within the knowledge of the offeree.

2. By lapse of time

When the proposer prescribes a time within which the proposal must be accepted, the proposal lapses as soon as the time expires.

3. After expiry of reasonable time

If no time has been prescribed, the proposal lapses after the expiry of a reasonable time. What is reasonable time will depend on the circumstances of the case.

Example :

On 8th June, *M* offered to take shares in *R* company. He received a letter of allotment on 23rd November. *M* refused to take the shares. Held, *M* was entitled to refuse as the offer had lapsed by the delay in acceptance. *Ramsgate Victoria Hotel Co. v. Montefiore*.¹

4. By failure of a condition precedent

An offer lapses by the failure of the acceptor to fulfil a condition precedent to acceptance, where such a condition has been prescribed.

¹ (1866) L. R. 1 Ex. 109

Example :

P says to *Q*. "I will sell my house at Delhi to you for Rs. 50,000 if you are married." The offer cannot be accepted until and unless *Q* is married.

5. By death or insanity

An offer lapses by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

6. Counter Offer

When a counter offer is given, the original offer lapse. See the Case of *Hyde v. Wrench*. (Page 23)

7. By refusal

A proposal once refused is dead and cannot be revived by its subsequent acceptance.

Example :

A offers to sell his farm to *B* for Rs. 1,000. *B* replies offering to pay Rs. 950. *A* refuses. Subsequently *B* writes accepting the original offer. There is no contract because the original offer has lapsed.

Revocation of Acceptance

Section 5 of the Contract Act provides that an acceptance can be revoked any time before the acceptance comes to the knowledge of the proposer but not afterwards.

Example :

P proposes, by a letter sent by post, to sell his house to *Q*. *Q* accepts the proposal by a letter sent by post. *Q* may revoke his acceptance any time before the letter communicating it reaches *P* but not afterwards.

The English law on this point is different. Under English law an acceptance is irrevocable once it is put in course of communication to the offeror. Thus in the above example *Q* could not have revoked the acceptance once he had posted the letter of acceptance.

Communication of Revocation

According to Section 3 of the Act, the revocation of a proposal or an acceptance is deemed to be made by any act or omission of the party by which he intends to communicate such revocation, or which has the effect of communicating it.

According to Section 4 of the Act, the communication of revocation is complete—

as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it ;

as against the person to whom it is made, when it comes to his knowledge.

Examples :

- (i) *P* makes a proposal to *Q*. *Q* sends a letter of acceptance. Subsequently *Q* revokes his acceptance by telegram. *Q*'s revocation is complete, as against *Q* when the telegram is despatched, and as against *P* when it reaches him.
- (ii) *A* revokes his proposal by telegram. The revocation is complete as against *A* when the telegram is despatched. It is complete as against *B* when *B* receives it. *B* revokes his acceptance by telegram. *B*'s revocation is complete as against *B* when the telegram is despatched, and as against *A* when it reaches him.

EXERCISES

1. When is an offer completed ? How and when may an offer be revoked ? (Pages 25-26, 29-31)
2. (a) How may an offer be terminated ? (Pages 26-28)
(b) *A* offers to sell *B* his horse for Rs. 1000 and tells *B*. 'This offer will remain open one week'. The following day *B* reject the offer. Within the week *B* changes his mind and notifies *A* that he accepts the offer. Is there a contract ? (Para 6, Page 30)
3. "Acceptance is to offer what a lighted match is to a train of gunpowder". Discuss. (Page 18)
4. "An offer is made when, and not until, it is communicated to the offeree". Explain with illustrations. (Para 6, page 20)
5. Define offer, and acceptance. When are offer and acceptance deemed to be complete if made through post ? (Pages 17, 27)
6. State how offer is made, revoked and accepted. What are the rules when offer is made through post office and over the telephone. (Pages 17, 22, 27-28)
7. "A mere mental acceptance, not evidenced by words or conduct is in the eye of law no acceptance." Explain. (Para 6, pages 24-25)
8. Define the term 'Acceptance' What are the essential of a valid acceptance ? (Pages 17, 22-26)
9. "Acceptance must be absolute, and must correspond with the terms of the offer." Discuss with suitable illustration. (Para 1, page 23)

10. (a) Explain the meaning of the terms, Offer and Acceptance. (Page 17)
- (b) (i) *A* offers to sell his goods to *B* by a letter posted on 1st March. *B* receives *A*'s letter on 3rd March. Can *A* revoke his offer? (Page 30)
- (ii) *B* posts his letter of acceptance on 4th March. *A* receives *B*'s acceptance on 6th March. Can *B* revoke his acceptance? (Page 30)
11. (a) Define a proposal. (b) How is an offer communicated? (Pages 17, 18-22)
12. Objective questions. Give short answers :
- (i) What is meant by acceptance by conduct? Give one example. (Page 24)
- (ii) "An advertisement to sell a thing by auction is (a) an offer (b) an invitation (c) no offer at all." What is the best alternative? (Page 19)
13. Problems :
- (a) *A* proposes, by a letter sent by post, to sell his house to *B*. *B* accepts the proposal by a letter sent by post. When *A* revokes his proposal or *B* his acceptance? (Pages 30-31)
- (b) *X* offers to sell a house in Calcutta to *Y* for Rs. 50,000. The offer is communicated to *Y* in Bombay by an express letter. The letter is delayed in the censor's office. Before *X*'s letter reaches *Y*, *Y* receives a telegram from *X* revoking his offer. Advise *Y*. (Pages 30-31)
- (c) *A* proposes by a letter sent by post to sell his house to *B*. *B* accepts the proposal by a letter sent by post. When can *B* revoke this acceptance? (Pages 19-20)
- (d) *A* offers a reward to whosoever shall do a certain thing. *B* does the thing, not knowing of the advertised reward. Is *A* bound to pay the reward to *B*? (Pages 19-20)
- (e) *A* duly posts a letter of acceptance to *B*. But the letter is lost in transit by the negligence of the Post Office. What is the effect? (Page 26)

INTENTION TO CREATE LEGAL RELATIONS

An agreement does not become a binding contract unless there is an intention to enter into legal relations. The parties must intend that the transaction should be attended by legal consequences and create legal obligations. The intention of the parties is to be gathered from the terms of the agreement and the surrounding circumstances. In arriving at a conclusion as to what is the interest of the parties the courts usually apply an objective and not subjective test. Any way it is upto the courts to decide whether the parties have intended to enter into legal obligations.

A contract, however, is defined as an agreement enforceable by law. An agreement which does not create any legal obligation will not be enforced by law. Hence such an agreement is not a contract. *X* offers to play cards with *Y* for pleasure and *Y* accepts. In later on *X* refuses to do so, *Y* cannot go to the courts for enforcing the promise. Hence, such an offer does not create a contract. The courts of law are not concerned with enforcing social obligations. They deal with legal obligations. *Balfour v. Balfour*.¹

“Agreeing to agree”—See, Uncertain ; Agreements, ch. 8.

Examples :

- (i) *D*, agrees to go to a cinema with *B*. This is not a contract enforceable by law because going to a cinema is not a legal matter.
- (ii) *R* Company made an agreement with *G* Company whereby they were made agents of the latter. One clause in the agreement was as follows : “This arrangement is not entered into as a formal or legal agreement and shall not be subject to legal jurisdiction in the law courts”. Held, there was no intention to create any legal relation ; hence there was no contract. *Rose and Frank Co. v. Crompton Bros. Ltd.*²
- (iii) A company agreed with *V* that on expiration of *V*’s existing contract, they would “favourably consider” the renewal of his contract. Held, no obligation was created to renew the contract. *Montreal Gas Co. v. Vasey*.³

¹ (1919) 2 K.B. 571

² (1925) A. C. 445

³ (1900) A. C. 595

EXERCISES

1. Discuss—"The offer must be one which in its natural meaning may be taken to contemplate and which is capable of creating legal relations." (Page 33)
2. Explain : "In order that an offer may be made binding by acceptance, it must be made in contemplation of legal consequences." (Page 33)

Definition of Consideration

Consideration is an essential element in a contract. Subject to certain exceptions, an agreement is *not* enforceable unless each party to the agreement gets something. This "something" is called consideration. It is used in the sense of *quid pro quo* i.e. something in return.

In the English case, *Currie v. Misa*,¹ consideration was defined as, "some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."

Section 2(d) of the Contract Act defines consideration as follows : "When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from, doing, something, such act or abstinence or promise is called a consideration for the promise."

Examples

- (i) *P* agrees to sell a house to *Q* for Rs. 80,000. For *P*'s promise, the consideration is Rs. 80,000. For *Q*'s promise, the consideration is the house.
- (ii) *H* engages *Q* as a clerk in his office for Rs 1000 a month. The monthly wage is the consideration received by *Q*; the services of *Q* constitute the consideration received by *H*.
- (iii) *X* promises not to file a suit against *Y* if *Y* pays him Rs. 100 by a fixed date. The forbearance of *X* is the consideration for *Y*'s payment.

Types of Consideration

Consideration may be classified into three types, as follows :

1. **Past consideration** : When the consideration of one party was given before the date of the promise, it is said to be past. Suppose that *X* does some work for *Y* in the month of January (without expecting any payment). In February *Y* promises to pay him some money. The consideration of *X* is past consideration.

¹ (1875) L.R. 10 Ex 162

Under English law past consideration is no consideration and a contract based on past consideration is void. But under Indian law a past consideration is good consideration because the definition of consideration in Section 2 (d) includes the words "has done or abstained from doing".

2. *Present consideration* : Consideration which moves simultaneously with the promise is called Present Consideration or *Executed Consideration*. *B* buys an article from a shop and pays the price immediately. The consideration moving from *B* is present or executed consideration.

3. *Future consideration* : When the consideration is to move at a future date, it is called Future Consideration or *Executory Consideration*. In a contract the consideration may be executory on both sides. A promise may support a promise. Thus a promise to pay money at a future date for goods to be delivered at a future date is a valid contract.

Rules (or the Essential Factors) of Consideration

The following rules may be laid down regarding consideration :

1. *Desire (or request) of the promisor is essential* : The act done or loss suffered by the promisee must have been done or suffered at the desire of the promisor. An act done without any request is a voluntary act and does not come within the definition of consideration.

Examples :

- (i) *P* sees *Q*'s house on fire and helps in extinguishing it. *Q* did not ask for his help. *P* cannot demand payment for his services.
- (ii) The Collector of a district asked *D* to spend some money on the improvement of a market and he did so. *D* cannot demand payment from the shopkeepers using the market for having improved the market. *Durga Prasad v. Baldeo*.¹
- (iii) *X* promised to pay *Y* some money by a letter. *Y* showed the letter to *Z* who thereupon consented to the marriage of her daughter with *Y*. *Z* cannot force *X* to pay the money to *Y* because there is no connection between the marriage and the promise to pay. *Dashwood v. Jermyn*.²

2. *The consideration must be real* : The consideration must have some value in the eye of law. It must not be sham or illusory.

¹ (1880) 3 All. 221

² 12 Ch. D. 776

The impossible acts and illusory or non-existing goods cannot support a contract. Therefore, real consideration comes from good consideration. (See p. 39)

A contribution to charity is without consideration. Therefore, it is not real consideration. (See p. 38)

Examples :

- (i) *Illusory consideration* : *G* promises for no consideration, to give *H* Rs 1,000. This is a void agreement. No consideration, no contract.
- (ii) *Impossible act* : *X* promises to supply *Y* one *tola* of gold brought from the sun. The consideration is sham and illusory and there is no contract.
- (iii) *No consideration* : *V* owed £208 to *E* who told *V* that if the money was not paid by 7th July he would file a bankruptcy petition against *V*. Thereupon *V* promised to pay the money before 12 o'clock on 8th July and *E* agreed not to file the petition before that time. Held, there was no consideration for *E*'s promise. *Vanburgen v. St. Edmunds Properties Ltd.*¹

Example (iii) above illustrates the rule that a promise to do what one is already bound to do (whether under the law or under an existing contract) confers no additional benefit and is of no value. The consideration is unreal. A promise to pay an existing debt punctually if the creditor gives a discount is without consideration and the discount cannot be enforced.

3. *Public duty* : "Where the promise is already under an existing public duty, an express promise to perform, or performance of, that duty will not amount to consideration. There will be no detriment to the promisee or benefit to the promisor over and above their existing rights and liabilities"² *Example* : A contract to pay money to a witness who has received a subpoena to appear at a trial. *Collins v. Godefrey*.³

4. *Promise to a stranger* : But a promise made to a stranger to perform an existing contract, is enforceable because the promisor undertakes a new obligation upon himself which can be enforced by the stranger. *X* wrote to his nephew *B*, promising to pay him an annuity of £150 in consideration of his marrying *C*. *B* was already engaged to marry *C*. Held, the fulfilment of *B*'s contract with *C* was consideration to support *X*'s promise to pay the annuity. *Shadwell v. Shadwell*.⁴

¹ (1933) 2 K. B. 223

³ (1831) 1B & AD. 950

² Anson, *Law of Contract*, p. 96

⁴ (1860) 9 C.B.N.S. 159

5. *Consideration need not be adequate* : Section 25 (explanation 2) provides that, "An agreement to which the consent of the party is freely given is not void merely because the consideration is inadequate ; but the inadequacy of the consideration may be taken into account by the court in determining the question whether the consent of the promisor was freely given."

The reason behind this rule is that it is impossible for the court to decide what is adequate consideration. The parties to the contract must decide the quantum of consideration and, if consent was freely given, the court will enforce the agreement.

If the consideration is inadequate, the Court may hold that consent of the promisor was not freely given and the agreement may become void.

"Consideration" means a reasonable equivalent or other valuable benefit passed on by the promisor to the promisee or by the transferor to the transferee. Similarly, when the word 'Consideration' is qualified by the word 'adequate', it makes consideration stronger so as to make it sufficient and valuable having regard to the facts, circumstances and necessities of the case. *Sonia Bhatia v. State of U. P. and others.*¹ /

Examples :

- (i) *P* agrees to sell a horse worth Rs 1000 for Rs. 10. *P*'s consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.
- (ii) *D* promises to *B* to sell land in Calcutta at Rs. 10 per cottah. The agreement is valid provided the consent of *D* was freely given.
- (iii) *S* files a suit against *B* for Rs. 5,000. Subsequently he agrees to withdraw the suit on payment of Rs. 3,000. The agreement is a contract. The withdrawal of a suit is valuable consideration so as to support the promise to pay money.

6. *The consideration must not be illegal, immoral, or opposed to public policy* : If either the consideration of the object of the agreement is illegal, the agreement cannot be enforced. The same principle applies if the consideration is immoral or opposed to public policy. [See, Section 23 and ch. 8 for examples of such agreements.]

7. *The consideration may be present, past, or future* : This follows from the definition of consideration given in the Act.

¹ AIR (1981) Supreme Court 1274

8. *Consideration may move from the promisee or from any other person* : A person granted some properties to his wife *C* directing her at the same time to pay an annual allowance to his brother *R*. *C* also entered into an agreement with *R* promising to pay the allowance to *R*. This agreement can be enforced by *R* even though no part of the consideration received by *C* moved from *R*. *Chinnaya v. Ramaya*.¹ A stranger to the consideration can sue to enforce the contract, though a stranger to the contract cannot. In England, a stranger to the consideration cannot sue on the contract.

9. *What is good consideration?* : The rules or the necessary factors for consideration can be summed up as follows : (1) There must be desire of the promisor ; (2) it must be real ; (3) reasonable ; (4) not illegal, immoral or opposed to public policy ; (5) present, past or future ; and (6) from the promisee or any person.

Subject to the above essential factors, a good consideration can be any of the following : (1) physical goods ; (2) services ; (3) forbearance (for example not to sue) ; (4) arbitration or the compromise of disputed claims, and (5) settlement or composition with creditors.

DIFFERENCES BETWEEN ENGLISH AND INDIAN LAW REGARDING CONSIDERATION

In England, a distinction is made between Formal Contracts and Simple Contracts. A Formal Contract is one which is (a) in writing or printed, (b) signed, (c) sealed, and (d) delivered to the other party. All other contracts are called Simple Contracts. Under English law, Formal Contracts do not require any consideration but Simple Contracts must be supported by some consideration. Formal Contracts are also called Contracts Under Seal and Specialty Contracts. Simple Contracts are also called Parole Contracts.

The differences between the English and the Indian law relating to consideration are enumerated below.

1. The Indian law of contract does not make any distinction between Formal Contracts and Simple Contracts. In India, excepting the few cases mentioned below, all contracts require consideration.

¹ (1881) 4 Mad. 137

2. Under English law past consideration is no consideration. Under Indian law past consideration is good consideration.

3. Under English law, consideration must move from the promisee. Under Indian law, it may move from the promisee or any other person.

4. The rules regarding "Devolution of Joint Rights and Liabilities" are different. See ch. 10 (Page 102).

PROMISE TO CHARITIES

A promise to make a contribution to charity is not enforceable because it is without consideration.

Example :

A person agreed to pay to a charitable society a percentage of the value of the goods imported by him. He then executed a *hatchitta* for the arrears of contribution to that charity. The Court held this was no more than a repetition of a voluntary promise and is not enforceable, *Jamuna v. Ram*.¹

In *Kedernath v. Gorie Mahomed*² the defendant promised to pay Rs 1,000 towards the construction of the Howrah Town Hall and the trustees of the Town Hall, on the basis of this and similar other promises, engaged contractors for building the hall. The defendant subsequently refused to pay the money and a suit was filed against him. The Calcutta High Court held that ordinarily subscriptions to charitable objects were not recoverable but if the promisors knew the purposes of the charity and also knew that on the strength of their promises obligations would be undertaken to third parties (the building contractors in this case) the promise is enforceable. This decision is contrary to English decisions on similar facts. In subsequent cases on this point in Indian courts, the Calcutta decision has not been followed.

In an Allahabad case, a person subscribed Rs. 500 to rebuild a mosque. It was held that the promise was without consideration and that the subscriber was not liable. *Abdul Aziz v. Masum Ali*.³

¹ 169 I.C. 396 (Privy Council) ² (1886) 14 Cal 64

³ (1914) 36 All. 268

“NO CONSIDERATION NO CONTRACT”— EXCEPTIONS TO THE RULE

Explanation

Consideration is essential for the validity of a contract. “A promise without consideration is a gift; one made for a consideration is a bargain”.—Salmond and Windfield, *Law of Contracts*.

A promise without consideration is a gratuitous undertaking and cannot create a legal obligation. Under Roman law an agreement without consideration was called a *nudum pactum* and was unenforceable. Under English law simple contracts must be supported by consideration but specially contracts require no consideration. Under Indian law the presence of consideration is, as a rule, essential to the validity of contracts.

Exceptions

There are exceptional cases where a contract is enforceable even though there is no consideration. They are as follows :

1. *Natural love and affection* : An agreement made without consideration is valid if, ‘it is expressed in writing and registered under the law for the time being in force for the registration of documents, and is made on account of natural love and affection between parties standing in a near relation to each other.’—Sec 25(1).

An agreement without consideration is valid under Section 25 (1) only if the following requirements are complied with :

- (i) The agreement is made by a written document.
- (ii) The document is registered according to the law relating to registration in force at the time.
- (iii) The agreement is made on account of natural love and affection.
- (iv) The parties to the agreement stand in a near relation to each other.

Examples :

- (i) A for natural love and affection, promises to give his son B, Rs. 1,000. A puts his promise to B in writing and registers it. This is a contract. [Illustration (b) to Section 25]
- (ii) An agreement entered into by a husband with his wife, during quarrels and disagreement, whereby the husband promised to give some property to the wife. The agreement is void because, under

the circumstances, there is no natural love and affection between the parties. *Rajlukhy Dehee v. Bhootnath*¹

2. *Voluntary Compensation* : A promise made without any consideration is valid if, "it is a promise to compensate wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do."—Sec. 25(2).

Section 25(2) applies when there is a voluntary act by one party and there is a subsequent promise (by the party benefited) to pay compensation to the former. The term 'voluntarily' signifies that the act was done, "otherwise than at the desire of the promisor".

Examples :

- (i) *D* finds *B*'s purse and gives it to him. *B* promises to give *D* Rs. 50. This is a contract.
- (ii) *D* supports *B*'s infant son. *B* promises to pay *D*'s expenses in so doing. This is a contract.

3. *Time-barred debt* : A promise to pay, wholly or in part, a debt which is barred by the law of limitation can be enforced if the promise is in writing and is signed by the debtor or his authorised agent.—Sec. 25(3). A debt barred by limitation cannot be recovered. Therefore a promise to repay such a debt is, strictly speaking, without any consideration. But nevertheless such a promise can be enforced if the debtor or his authorised agent makes written and signed promise to repay it.

The debt must be a liquidated or ascertained sum of money and there must be a definite promise to pay. A mere acknowledgement of the debt is not enough.

Example :

D owes *B* Rs. 1000 but the debt is barred by the Limitation Act. *D* signs a written promise to pay *B* Rs. 500 on account of the debt. This is a contract.

4. *Agency* : No consideration is required to create an agency.—Sec. 185.

5. *Completed gift* : The rule "no consideration, no contract" does not apply to completed gifts. Explanation 1, to Section 25 states that, "Nothing in this section shall affect the validity as between the donor and the donee, of any gift actually made."

¹ (1900) C.W.N. 488

Thus, if a person gives certain properties to another according to the provisions of the Transfer of Property Act (*i.e.*, by a written and registered document) he cannot subsequently demand the property back on the ground that there was no consideration.

STRANGER TO CONTRACT : CAN A PERSON WHO IS NOT A PARTY TO A CONTRACT SUE UPON IT ?

Difference between the rights of a stranger to a contract and of a stranger to the consideration : A stranger to a contract, *i.e.*, one who is not a party to it, cannot file a suit to enforce it. A contract between *P* and *Q* cannot be enforced by *R*. Lord Haldane said that, "It was a fundamental principle of English law that only a person who is a party to a contract can sue on it and that the law knows nothing of a right gained by a third party arising out of a contract." *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.*¹

But a stranger to the consideration can sue to enforce it provided he is a party to the contract. A contract between *P*, *Q* and *R* whereby *P* pays money to *Q* for delivering goods to *R* can be enforced by *R* although he did not pay any part of the consideration.

Exceptions

There are certain exceptions to the rule that a stranger to the contract cannot sue upon it. They are as follows :

1. *Beneficiaries in the case of trust* : An agreement to create a trust can be enforced by the beneficiary. *D* agrees to transfer certain properties to *T* to be held by *T* in trust for the benefit of *C*. *C* can enforce the agreement though he was not a party to the agreement.

2. *Provision of Marriage Settlement of Minor* : In *Khwaja Muhammad Khan v. Husaini Begum*², the father of the bridegroom had contracted with the father of the bride to make the daughter an allowance called *Kharchi-i-pandan* if she married the son. After the marriage the daughter sued her father-in-law to recover arrears of the allowance. The Privy Council held that though she was no party to the contract yet, "she was clearly entitled to proceed in equity to enforce her claim."

¹ (1915) A.C. 847

² (1910) 32 All. 410 (Privy Council)

3. *Assignee of a contract* : Under certain circumstances a party to a contract can transfer his rights under the contract to third parties. For example, the holder of a bill of exchange can transfer it to any person he wishes. In such cases the transferee or the assignee can sue on the contract even though he was not a party to it originally. Assignment may occur through operation of law. For example, when a person becomes insolvent, all his properties and rights vest in the Official Assignee who can sue upon contracts entered into by him.

4. *Family Settlement* : When family disputes are settled by mutual agreement and the terms of settlement are written down in a document, it is called a Family Settlement. Such agreements can be enforced by members of the family who were not originally parties to the settlement.

5. *Acknowledgement or Estoppel* : Where the promisor by his conduct, acknowledges himself as an agent of the third party, a binding obligation is thereby incurred towards him. Thus in *Khirode Behari Dull v. Man Govinda Pande* case (1933, 61 Cal 841, AIR 1934 Cal 682) the landlord was allowed to recover unpaid rent from the sub-tenant whereas under an agreement between a tenant and his sub-tenant the sub-tenant was paying the rent directly to the landlord.

Rights and Liabilities of a Stranger

With the exception of the above cases, a contract cannot confer rights upon a person who is not a party to it. Also, a contract cannot impose a *liability upon a person who is not a party to it*.

Examples :

- (i) *X* and *Y* entered into an agreement to pay a certain sum of money to their children *C* and *D* upon their marriage. The marriage took place. *X* died. *C* sued to recover the money from the executors of *X*. Held, he cannot sue. *Tweddle v. Atkinson*.¹
- (ii) *P* sold to *Q* some rubber with a condition that the goods were not to be resold below a certain price. *Q* sold the goods to *R* who was aware of the condition. *R* resold the goods below the stated price. Held, *P* cannot enforce the condition against *R* because there was no contract between *P* and *R*. *McGruther v. Pitcher*.²
- (iii) The managing director of a theatre gave instructions that no tickets were to be sold to *S*. Knowing this, *S* asked a friend to buy a ticket for

¹ (1861) 1 B & S 393

² (1904) 2 Ch. 306

him. With this ticket *S* went to the theatre but was refused admission. He filed a suit for damages for breach of contract. Held, no cause of action because there was no privity of contract between the plaintiff and the defendant. *S. Said v. Butt*.¹

EXERCISES

1. Define consideration. Critically discuss the essential elements of consideration. (Pages 35, 36-39)
2. "Past consideration is no consideration". Comment. (Para 1, page 36)
3. Define consideration and point out the differences between English law and Indian law in this respect. (Pages 35, 39-40)
4. "Insufficiency of consideration is immaterial; but an agreement without consideration is void." Explain. (Para 5, page 38)
5. State the circumstances in which a contract without consideration may be treated as valid. (Pages 41-43)
6. Discuss the rule that a stranger to a contract cannot sue on the contract and the exceptions to that rule. (Pages 43-44)
7. 'A stranger to the consideration may sue on a contract but not a stranger to the contract.' Explain. (Pages 43-44)
8. "A stranger to a contract cannot sue to enforce the contract." Discuss. (Pages 43-44)
9. (a) What do you mean by consideration? (Pages 35-36)
(b) Describe with examples the agreements which can be valid without consideration. (Pages 41-43)
10. Under what circumstances can a person who is not a party to contract sue upon it? (Pages 43-44)
11. (a) Define 'consideration' and analyse the elements of consideration. (Pages 35-39)
(b) State the case in which an agreement without consideration is valid. (Pages 41-43)
12. "An agreement without consideration is void unless it is in writing and registered." Explain. (Para 1, page 41)
13. (a) State the essential factors of consideration.
(b) *A* promises in writing to pay wholly an ascertained amount which is barred by limitation. Is this agreement valid? Justify your answer. {(a) Pages 36-39, (b) Para 3, page 30}
14. Objective questions. Give short answers. (2 marks)
(i) Give two examples of cases where a contract is enforceable though there is no consideration. (Pages 41-43)
(ii) Give two examples of exceptions of the rule that a stranger to the contract cannot sue upon it. (Pages 43-44)

¹ (1920) 3 K.B. 497

An agreement which does not satisfy the essential elements of a contract may be either void or voidable. The definitions of these terms are given below.

1. Void Agreement

“An agreement not enforceable by law is said to be void.”—Sec. 2(g). A void agreement has no legal effect. It confers no rights on any person and creates no obligations.

Examples of Void Agreement : An agreement made by a minor ; agreements without consideration (except the cases coming under Sec. 25, p. 42) ; certain agreements against public policy ; etc. [A list of such agreements is given in ch. 8]. These agreements are void *ab initio*, i.e., void from the beginning.

Agreements which become void : An agreement, which was legal and enforceable when it was entered into, may subsequently become void due to impossibility of performance, change of law or other reasons. When it becomes void the agreement ceases to have legal effect. [The rights and obligations of the parties in such cases are discussed in ch. 11]

There are certain agreements which are expressly declared to be void even though they may otherwise satisfy Sec. 10 of the Indian Contract Act. (i.e. would have been otherwise enforceable contracts). They are as follows :

1. Section 26 of the Contract Act provides that every agreement in restraint of the marriage of any person, other than a minor, is void.
2. Section 27 of the Act states that every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.
3. According to Section 28 of the Act Private individuals cannot by agreement alter or vary their personal law or the Statute law.
4. Section 29 implies that agreements, the meaning of which is not certain, or capable of being made certain, are void.
5. Section 30 of the Contract Act clearly states that agreements by way of wages are void.

6. Section 56(1) provides that agreements to do an act impossible in itself are void.
7. Section 24, 57 and 58 maintain that agreements whose objects or considerations are unlawful are void.

2. Voidable Agreement

A voidable agreement is one which can be avoided, i.e., set aside by some of the parties to it. Until it is avoided, it is a good contract. "An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract."—Sec. 2(i).

Examples of voidable contracts : Contracts brought about by coercion, undue influence, misrepresentation etc.

X coerces Y into entering into a contract for the sale of Y's house to X. This contract can be avoided by Y. X cannot enforce the contract. But Y, if he so desires, can enforce it against X.

Unenforceable Agreement

The term Unenforceable Agreement is used in English law. It means an agreement which cannot be enforced in a court of law, one or both of the parties, because of some technical defect, e.g., want of registration or non-payment of the requisite stamp duty.¹

Illegal Agreement

An Illegal Agreement is one which is against a law in force in India. *Example* : an agreement to commit murder, robbery or cheating.

Distinction between a Void Agreement and an Illegal Agreement

An illegal agreement is also void. But a void agreement is not necessarily illegal. An agreement may not be contrary to law but may still be void. An agreement, the terms of which are uncertain, is void but such a contract is not illegal.

When an agreement is illegal, other agreements which are incidental or collateral to it are void. The reason underlying this rule is that the courts will not enforce any agreement entered into with the object of assisting or promoting an illegal transaction.

¹ Anson. *Law of Contract*, p. 8.

If the main agreement is void, (but not illegal) agreements which are incidental or collateral to it may be valid. (See examples of Wagering Agreement in ch. 8)

Examples :

- (i) *P* engages *B* to kill *C* and borrows Rs. 100 from *D* to pay *B*. Here the agreement with *B* is illegal. The agreement with *D* is collateral to it, if *D* is aware of the purpose of the loan. In this case the loan transaction is void and *D* cannot recover the money. But if *D* is not aware of the purpose of the loan, it may be argued that the loan transaction is not collateral to the other illegal agreement and is valid.
- (ii) *W* enters into a wagering agreement and borrows Rs. 100 for the purpose. The main agreement is void but the loan transaction being merely collateral to it is valid even though the creditor is aware of the purpose of the loan.

Valid Contract

An agreement which satisfies all the essential elements of a contract, and which is enforceable through the courts is called valid contract.

EXERCISES

1. Distinguish between void agreements and voidable contracts. (Page 46)
2. Explain the difference between a void and illegal transaction with reference to collateral transactions. Give illustrations for each. (Page 47)
3. Distinguish between : Void, voidable and unenforceable contract. What is a 'valid contract'? (Pages 46-47)
4. Problem : State whether the following agreement is a valid contract : *A* Promises to pay Rs 1,000 to *B* who is an intended witness in a suit against *A* in consideration of *B*'s absconding himself at the trial. (Page 47)
5. Give two examples of each of the following :
(a) Void agreement (b) Voidable agreement (c) Enforceable agreement. (Page 46)
6. State the void agreements under the Indian Contracts Act. (Page 46)

Definition of "Capacity"

One of the essential conditions for the validity of an agreement is that *all* the parties to it must have capacity to enter into contracts. Section 11 of the Contract Act states that "Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject."

From Section 11 it follows that a person is incapable of entering into contracts under the following circumstances :

- (i) if he has not attained the age of majority according to the law to which he is subject ;
- (ii) if he is not of sound mind (*i.e.*, if he is a lunatic or an idiot or suffering from a similar disability) ; and,
- (iii) if he is disqualified from contracting by any law to which he is subject.

Cases of Incapacity are discussed below.

MINORITY**Who is a minor ?**

(According to the Indian Majority Act, 1875, a minor is one who has not completed his or her 18th year of age.) So a person becomes a major after the completion of 18th year of life. To this rule there are two exceptions—(i) when a guardian of the minor's person or property is appointed by a court of law and (ii) when a minor's property is taken over by the Court of Wards¹ for management. In either cases minority continues up to the completion of the 21st year.²

¹ Under the Court of Wards Act, estates of incompetent persons like, minors or lunatics can be placed under the guardianship of the Court of Wards. The Board of Revenue may act as the Court of Wards.

² In England, since the Enforcement of Family Reforms Act of 1969, the age of minority continues up to the completion of 18th year.

Why should minors be protected ?

Minors are very often exploited, ill-treated and their properties stolen. Law provides that it is the duty of the Court to guard against their lack of knowledge and experience. The actions of the older persons aggravate ill-use of minors. In England the Crown is considered to be the guardian of the minors. For the reasons stated above the Court protects the minors in India.

The Law regarding Minor's Agreement

The law regarding agreements by minors may be summarised as follows :

1. Minor's Agreement is Void

An agreement by a minor is (subject to the exceptions noted under 2 and 3 below) absolutely void and inoperative. *Mohori Bibi v. Dharmodas Ghose*.¹ In this case a minor executed a mortgage for Rs. 20,000 and received Rs. 8000 from the mortgagee. He sued for setting aside the mortgage. The mortgagee wanted refund of the sum which he had actually paid ; viz. Rs. 8,000. The Privy Council held that an agreement by a minor was absolutely void and therefore the question of refunding the money did not arise. Had the agreement been only voidable, the benefit received would have been refundable under Sec. 64 or Sec. 65 of the Act [See end of ch. 11].

The decision of the Privy Council that an agreement by a minor is void, is based upon a strict interpretation of Section 11 of the Act. The reason underlying the rule is that a minor is supposed to be incapable of judging what is good for him. His mental faculties are not mature and therefore the law protects him. With certain exceptions, promises made by a minor will not be enforced against him.

2. A minor can be a promisee

An agreement under which a minor has *received a benefit* can be enforced as against the other party. A minor in whose favour a mortgage has been executed can get a decree for the enforcement of the mortgage. *Raghavachariah v. Srinivas*.² Similarly a promissory note executed in favour of the minor can be enforced. Under English law, agreements for the infant's

¹ (1903) 30 I.A. 114 (Privy Council)

² 40 Mad. 308

education, service, or apprenticeship, and agreements which enable him to earn his living are binding unless they are detrimental to his interest.

Example :

D, an infant professional boxer, held a licence from the British Boxing Board under which his money was to be stopped if he was disqualified. *D* sued to recover it. Held, the contract was for his benefit and was binding on him. *Doyle v. White City Stadium*.¹

3. Minor's Liability for Necessaries

The minor's property is liable for the payment of a *reasonable price for necessities supplied* to the minor or to anyone whom the minor is bound to support.

What is a necessary article is to be determined from the status, and the social position of the minor. The price which the trader will get is reasonable price, not the price "agreed to" by the minor. Only the minor's property is liable. The minor is not personally liable.

Examples :

- (i) A trader supplies a minor with rice needed for his consumption. He can recover the price from the minor's property.
- (ii) *Inman*, an infant undergraduate in Cambridge bought eleven fancy waistcoats from *Nash*. He was at the time adequately provided with clothing. Held, the waistcoats were not necessary and the price could not be recovered. *Nash v. Inman*.²
- (iii) When a minor is engaged in trade, contracts entered into by him for trading purposes are not for necessities and are not binding on him.
- (iv) It has been held that reasonable expenses incurred for the following purposes are necessities—marriage of the minor; marriage of his sister; cost of defending a minor in civil and criminal proceedings; funeral ceremonies of the wife, husband or children of the minor; *sradh* ceremonies of the ancestors of the minor.

The case of necessities supplied to a minor is covered by Section 68 of the Contract Act which provides as follows: "If a person incapable of entering into a contract, or anyone whom he is legally bound to support, is supplied by another person with necessities suited to his condition of life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person." [See ch. 12]

¹ (1985) 1 K. B. 110

² (1908) 2 K.B. 1

So far as necessities are concerned, the minor's liability does not arise out of contract. Fletcher Moulton J. in *Nash v. Inman* observed as follows : "The basis of the action is hardly contract. Its real foundation is an obligation which the law imposes on the infant to make a fair payment in respect of needs satisfied." See example (ii) above.

What are "necessaries" ? What goods and services are "necessaries" for minors are determined by their status and social position. Necessaries include the following :

(1) *Goods* : Physical goods are necessary not only for bare existence and also for reasonable comforts and luxuries to which the minor concerned is habituated.

(2) *Services rendered* : A minor requires certain services for example a nurse for an infant, a teacher for him, the marriage expenses of a minor etc.

(3) *Loans* : If required the minor can incur loans for his necessities.

4. Law regarding Compensation or Restitution

A minor cannot be compelled to compensate for or refund any benefit which he has received under a void agreement because Sections 64 and 65 of the Act do not apply to such cases. [See ch. 11]

But it has been held in a number of cases that the court may, on cancelling an instrument at the instance of a minor, require the minor to make compensation to the other party. The court's power, to do so, is given by Section 41 of the Specific Relief Act of 1877 which is as follows : "On adjudging the cancellation of an instrument the court may require the party to whom such relief is granted to make any compensation to the other which justice may require." Section 38 of the Specific Act provides in similar terms for cases where a contract is rescinded.

Example :

A minor sells a house for Rs. 10,000. Later he files a suit to set aside the sale on the ground of minority. He *may* be directed to refund the purchase-money received by him.

5. No Estoppel

A minor who falsely represents himself to be a major, and thereby induces another person to enter into an agreement with

him, can nevertheless *plead minority as a defence* in an action on the agreement. There can be no estoppel against a minor. *Sadik Ali Khan v. Jaikishore*.¹ In the English case, *R. Leslie Ltd. v. Shell*,² the Court of Appeal held that where an infant obtains a loan by falsely representing his age, he cannot be made to pay the amount of the loan as damages for fraud, nor can he be compelled in equity to repay the money. But in India it has been held that the court can direct the minor to pay compensation to the other party in such cases. *Khan Gul v. Lakha Singh*.³

[*The Principle of Estoppel* : The Principle of estoppel is a rule of evidence. When a man has, by words spoken or written, or by conduct, induced another to believe that a certain state of things exists, he will not be allowed to deny the existence of that state of things. "Estoppel arises when you are precluded from denying the truth of anything which you have represented as a fact, although it is not a fact." (Lord Halsbury)]

6. No Ratification

A minor on attaining majority *cannot ratify* an agreement entered into while he was a minor. The reason is that a void agreement cannot be validated by any subsequent action and a minor's agreement is void *ab initio*. *Mahendra v. Kailash*.⁴

7. No specific performance

An agreement by a minor being void, the court will never direct *specific performance* of such an agreement by him.

8. No insolvency

A minor cannot be declared insolvent even though there are dues payable from the properties of the minor.

9. Partnership by minor

A minor cannot enter into a contract of partnership. But he can be admitted into the benefits of a partnership with the consent of all the partners. [See under Partnership. Book III. ch. 2]

10. A minor can be an agent

A minor can draw, make, indorse, and deliver negotiable instruments so as to bind all parties except himself. *A minor cannot be adjudicated an insolvent*. When a minor and a major

¹ AIR (1928) P. C. 152 (Privy Council)

² (1914) 3. K.B. 607

³ (1928) 9 Lah. 701

⁴ 55 Cal 841

jointly enter into an agreement with another person, the minor has no liability but the contract can be enforced against the major if his liability can be separately ascertained. If an adult stands surety for a minor, the adult is liable on the agreement although the minor is not.

11. Position of minor's guardian

An agreement entered into by the guardian of a minor on his behalf stands on a different footing from an agreement entered into by the minor himself. An agreement by a minor is void but an agreement by his guardian on his behalf is valid provided the obligations undertaken are within the powers of the guardian. The powers of a guardian are determined by the personal law of the minor and by the Guardian and Wards Act. An agreement made by the guardian is binding on the minor if it is for the benefit of the minor or is for legal necessity.

12. A company shares of a minor

A minor cannot apply for and be a member of a company. If a minor has, by mistake, been recorded as a member, the company can rescind the transaction and remove the name from the register. The minor can also repudiate the transaction and get his name removed, from the register. But where a minor was made a member and, after attaining majority, he received and accepted dividends, he will be estopped from denying that he is a member. *Fazalbhoy v. The Credit Bank of India*.¹

PERSONS OF UNSOUND MIND

Definition of "Sound mind"

For a valid agreement it is necessary that each party to it should have a sound mind. What is a "sound mind" for the purpose of contracting, is laid down in Section 12 of the Indian Contract Act.

Section 12 : "A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.

¹ 39 Bom. 331

A person who is usually of unsound mind, but occasionally of sound mind may make a contract when he is of sound mind.

A person who is usually of sound mind, but occasionally of unsound mind may make a contract when he is of sound mind.

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind."

“Illustrations :

(a) A patient in lunatic asylum, who is at intervals of sound mind, may make a contract during these intervals.

(b) A sane man who is delirious from fever, or who is so drunk that he cannot understand the terms of a contract, or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium of drunkenness lasts."

The test of soundness of mind is (i) capacity to understand the business concerned and (ii) ability to form a rational judgment as to its effect on a person's interest.

Unsoundness of mind may arise from—insanity or lunacy ; idiocy ; drunkenness and similar factors. A person under the influence of hypnotism is temporarily of unsound mind. Mental decay brought about by old age or disease also comes within the definition.

In each case it is a question of fact to be decided by the court whether the party to the contract was of sound mind or not. There being a presumption in favour of sanity, the person who relies on unsoundness of mind must prove it sufficiently to satisfy the court.

Idiocy

The term idiot is applied to a person whose mental powers are completely absent. Idiocy is a congenital defect caused by lack of development of the brain.

Lunacy or Insanity

This is a disease of the brain. A lunatic is one whose mental powers are deranged so that he cannot form a rational judgment on any subject. Lunacy can sometimes be cured. Idiocy is incurable.

Drunkenness

Drunkenness produces temporary incapacity. The mental faculties are clouded for a time, so that no rational judgment can be formed.

Effects of Agreements made by Persons of Unsound Mind

Agreements by persons of unsound mind are void. But an agreement entered into by a lunatic or a person of unsound mind for the supply of necessities for himself or for persons whom he is bound to support (e.g., his wife or children) is valid as a quasi-contract under Section 68 of the Act. Only the estate of such a person is liable. There is no personal liability. (See ch. 12)

The guardian of a lunatic can bind the estate of the lunatic by contracts entered into on his behalf. The mode of appointment of such a guardian and his powers are laid down in the Lunacy Act.

Examples :

- (i) A person 'agreed' to sell a property worth about Rs. 25,000 for Rs. 7,000. His mother proved that he was a congenital idiot and she pleaded for cancellation of the contract. The court held the agreement to be null and void. *Inder Singh v. Parmeshwardhari Singh*.¹
- (ii) If an agreement entered into by a person of unsound mind is for his benefit, it can be enforced. *Jugal Kishore v. Cheddu*.²

DISQUALIFIED PERSONS.

Aliens

An alien means a citizen of a foreign state. Contracts with aliens are valid. An alien living in India is free to enter into contracts with citizens of India. But the state may impose restrictions. Certain types of transactions with aliens may be prohibited. A contract with an alien becomes unenforceable if war breaks out with the country of which the alien concerned is a citizen. (Outbreak of War—see ch. 11)

Foreign sovereigns

Foreign sovereigns or governments cannot be used unless they voluntarily submit to the jurisdiction of the local court. *Mighell v. Sultan of Johore*.³

¹ AIR (1957) Pat 491

² (1903) All. L. J. 43

³ (1894) 1 Q. B. 149

Foreign sovereigns and governments can enter into contracts through agents residing in India. In such cases the agent becomes personally responsible for the performance of the contracts. (See under Agency, ch. 15)

Company and Corporation

See, "Contractual powers of Company and Corporation". Ch. 2, Book XI (Company Law).

Professional Persons

In England barristers are prohibited by the etiquette of their profession from suing for their fees. So also are members of the Royal College of Physicians. But they can sue and be sued for all claims other than their professional fees. For example, if a barrister or a member of the Royal College of Physicians engages a contractor of building a house he can sue for the enforcement of the contract.

In India these personal disqualifications do not exist. It has been held in *Nihal Chand v. Dilwar Khan*,¹ that a barrister can sue for his fees in India. A barrister, before he can practice in India, must be enrolled as an advocate under the Bar Council's Act of 1927 and the Advocates Act of 1961 and his legal status comes from such enrolment. An Advocate can realize his fees by a suit. *Gosta Behari Roy v. P. C. Gosh & Co.*² In India there is no restriction upon doctors as regards suing for their fees.

Women

In India there is no difference between men and women as regards contractual capacity. A woman (married or single) can enter into contracts and deal with her properties in any way she likes provided she is a major and does not suffer from any disability like lunacy or idiocy.

A married woman can bind her husband's properties for necessities supplied to her. She is an agent of her husband for this purpose. (See under Agency, ch. 15)

EXERCISES

1. What do you understand by capacity to contract? What is the effect of any agreement made by persons not qualified to contract?

(Pages 49-54)

¹ All. 570 (Full Bench)

² (1973) 77 C.W.N. 216

2. Who are competent to contract under the Indian Law of Contract? What is the legal effect if one of the parties to the contract is a minor? (Pages 49-54)
3. What is the minor's position in the law of contract? What is the leading case on the point? (Pages 50-54)
4. (a) What do you mean by capacity to enter into contract? (Page 49)
(b) *A*, trader, supplies *B*, a minor, with rice needed for his consumption. *B*, refuses to pay the price. Can *A* recover the Price? (Pages 50-51)
5. What is the effect of agreements entered into by persons of unsound mind? (Pages 54-55)
6. Write a note on the contractual capacity of Aliens; Foreign Sovereigns; Women. (Pages 54-56)
7. Objective questions. Give short answers.
 - (i) Who is a minor? (Page 49)
 - (ii) What do you understand by 'necessaries' supplied to a minor? (Para 3, pages 50-51)
 - (iii) Who is a Lunatic? (Page 55)

Definition of "Free Consent"

An agreement is valid only when it is the result of the "free consent" of all the parties to it. Section 13 of the Act defines the meaning of the term 'consent' and Section 14 specifies under what circumstances consent is 'free'.

Section 13 : "Two or more persons are said to consent when they agree upon the same thing in the same sense."

Consent involves a union of the wills and an accord in the minds of the parties. When the parties agree upon the same thing in the same sense, they have *consensus ad item*. For a valid contract the parties must be *ad idem*.

Section 14 : This section lays down that consent is *not free* if it is caused by (1) coercion, (2) undue influence, (3) fraud, (4) misrepresentation, or (5) mistake.

The definition of coercion, etc., and their effects on the formation of a contract are explained below.

COERCION**Definition**

Coercion is defined by Section 15 of the Act as follows : "Coercion is the committing or threatening to commit, any act forbidden by the Indian Penal Code, or unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever with the intention of causing any person to enter into an agreement.

Explanation—It is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed."

Features or Requisites

The provisions of Section 15 can be analysed as follows :

1. Coercion means (i) committing or threatening to commit an act forbidden by the Indian Penal Code, or (ii) the unlawful detaining or threatening to detain any property.

2. The act, constituting coercion, must be directed at *any* person and not necessarily at the other party to the agreement.

3. The act, constituting coercion, must have been done or threatened with the intention of causing any person to enter into an agreement.

4. It does not matter whether the Indian Penal Code is or is not in force in the place where the coercion is employed.

Examples :

- (i) *P* threatens to shoot *Q* if he does not let out his house to *P*, and *Q* agrees to do so. The agreement has been brought about by coercion.
- (ii) *P* threatens to shoot *Q* if *R* does not let out his house to *P* and *R* agrees to do so. The agreement has been brought about by coercion.
- (iii) An agent appointed by a person refused to hand over the book of account of the principal unless the principal released him from all liabilities concerning past transactions. The principal gave a release as demanded. Held, the release was obtained by coercion and was not binding. *Muthia v. Karuppan*.¹
- (iv) A girl of 13 was made to agree to adopt a boy by her husband's relative who prevented the removal of the dead body of her husband until she consented to the adoption. Held, the agreement to adopt was not binding. *Ranganayakamma v. Alwarsetti*.²
- (v) *A*, on board an English ship on the high seas ; causes *B* to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code. *A* afterwards sues *B* for breach of contract at Calcutta. *A* has employed coercion although his act is not an offence by the law of England and although the Indian Penal Code was not in force at the time when or the place where the act was done.

Consequences of Coercion

A contract brought about by coercion is voidable at the option of the party whose consent was so caused.—Sec. 19. The aggrieved party can have the contract set aside or he can refuse to perform it and take the defence of coercion if the other party sought to enforce it. The aggrieved party may, if he so desires, abide by the contract and insist on its performance by the other party.

Special Cases—

1. Prosecution

A threat to prosecute a man or to file a suit against him does not constitute coercion because it is not forbidden by the

¹ (1927) 50 Mad. 786

² (1889) 13 Mad. 214

Indian Penal Code. Compulsion of law is not coercion, undue influence, fraud, misrepresentation or mistake. *Andhra Sugars Ltd. v. State of A. P.*¹

2. High prices and high interest rates

It is not coercion to charge high prices or high interest rates because such acts are not forbidden by the Indian Penal Code.

3. A threat to commit suicide

Consent to an agreement may be obtained by threatening to commit suicide e.g., by a fast to death. The Madras High Court has held that this amounts to coercion. *Amiraju v. Seshamma*.² It was however, argued by Oldfield J, one of the judges of the Bench which decided this case, that Section 15 must be constructed strictly and that an act which is not punishable under the Indian Penal Code cannot be said to be "forbidden" by it. Suicide is not punishable by the Indian Penal Code; only the attempt to commit suicide is punishable. Therefore, suicide is not a crime and the threat to commit suicide is not coercion.

Duress

The term duress is used in English law to denote threats over the person or another with a view to obtain the consent of a party to an agreement. The scope of the term coercion is wider because it includes threats over property.

UNDUE INFLUENCE

Definition

A contract is said to be induced by undue influence where (i) one of the parties is in a position *to dominate the will of the other* and (ii) he uses the position to obtain *an unfair advantage* over the other.—Sec. 16 (1).

Presumptions

Section 16 (2) provides that undue influence *may be presumed to exist* in the following cases :

1. Where one party holds a real or apparent authority over the other or where he stands in a fiduciary relationship to the

¹ AIR (1968) Supreme Court 599

² (1917) 41 Mad. 33

other. Fiduciary relationship means a relationship of mutual trust and confidence. Such a relationship is supposed to exist in the following cases—father and son ; guardian and ward ; solicitor and client ; doctor and patient ; preceptor and disciple ; trustee and beneficiary etc.

2. Where a party makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress.

Examples :

- (i) *F* having advanced money to his son *B* during his minority, upon *B*'s coming of age obtains by misuse of parental influence, a bond from *B* for a greater amount than the sum advanced. *F* employs undue influence.
- (ii) *P*, a man enfeebled by disease or age, is induced by *B*'s influence over him as his medical attendant to agree to pay *B* an unreasonable sum for his professional services. *B* employs undue influence.
- (iii) A Malay woman of great age and wholly illiterate made a gift of almost the whole of her property to her nephew who was managing her estates. The gift was set aside on the ground of undue influence.

*Inche Noriah v. Shaik Omar.*¹

Consequences of Undue Influence

An agreement induced by undue influence is voidable at the option of the party whose consent was so caused. Such an agreement may be set aside absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, the court can set it aside upon such terms and conditions as may seem just.—Sec. 19A. The aggrieved party may, if he desires, treat the agreement as binding and enforce it against the other party.

According to the Madras High Court undue influence by a person, *who is not a party to the contract*, may make the contract voidable.

Burden of Proof

If a party is proved to be in a position to dominate the will of another and if it appears that the transaction is an unconscionable one, the burden of proving that the contract was not induced by undue influence, lies on the party who was in a position to dominate the will of the other.—Sec. 16 (3).

¹ (1929) A.C. 127

The existence of the power to dominate the will of another may be presumed to exist under the circumstances mentioned in Section 16 (2). [See para 2, above]

It has been held by judicial decisions that the existence of a power to dominate the will of another *cannot be presumed* in the case of landlord and tenant, and creditor and debtor. There is no presumption of undue influence between husband and wife. *Mackenzie v. Royal Bank of Canada*.¹ In these cases the party alleging undue influence must prove that undue influence existed.

Lack of judgment, want of prudence, lack of knowledge of facts, or absence of foresight are generally not, by themselves, sufficient reasons for setting aside a contract. Undue influence cannot be presumed merely from the existence of any of the aforesaid defects in a party. *Allcard v. Skinner*.²

Rebuttal

An allegation of undue influence may be answered or rebutted if the following facts were proved : (a) the injured person had independent advice ; (b) all material facts were disclosed ; and (c) the consideration was adequate.

When suspected

Undue influence is *suspected* in the following cases :

- (i) Inadequacy of consideration.
- (ii) Fiduciary relationship between the parties.
- (iii) Inequality between the parties as regards age, intelligence, social status, etc.
- (iv) Absence of independent advisors for the weaker party.
- (v) Unconscionable bargains. *Unconscionable bargain* is one which is against the conscience of reasonable persons and what shocks the public. If excessive profit is made it will also be within this term.

High rates of interest

It is usual for moneylenders to charge high rates of interest from needy borrowers. Can the court presume the existence of undue influence in such cases ?

Illustration (d) of Section 16, Contract Act is as follows :
 "A applies to a banker for a loan at a time when there is

¹ (1934) A. C. 468

² (1887) 36 Ch. D. 145

stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. *A* accepts the loan on these terms. This is a transaction in the ordinary course of business and the contract is not induced by undue influence."

So a transaction will not be set aside merely because the rate of interest is high. But if the rate is so high that the court considers it unconscionable, the burden of proving that there was no undue influence lies on the creditor. This is made clear by illustration (c) of Section 16 which is as follows : "*A*, being in debt to *B*, the moneylender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on *B* to prove that the contract was not induced by undue influence."

In India, in most of the States, there are Money Lenders Acts which lay down the maximum rates of interest which can be charged. Also, under the Usurious Loans Act of 1918, the court has discretionary power to reduce rates of interest whenever they appear to be unconscionable.

Mental Distress

A poor Hindu widow was badly in need of money for her maintenance. A money-lender availed of the opportunity of her predicament and persuaded her to make an agreement to pay 100% interest. The court reduced the interest. *Raghunath Prasad v. Sarju Prasad*.¹

High Prices

As regards high prices the general opinion is that if a trader puts his prices up during scarcity and a buyer agrees to pay such high prices, it is a transaction in the ordinary course of business and is *not* a case of undue influence. In certain cases high prices may amount to profiteering and blackmarketing. They are criminal offences.

Pardanishin Woman

Women, who observe the custom of *Parda*, i.e., seclusion from contact with people outside her own family, are peculiarly susceptible to undue influence. Therefore, Indian courts have held that a contract made by or with a *pardanishin* lady may be set

¹ AIR (1924) Privy Council 60

aside by her unless the other party to the contract satisfies the court that the terms of the contract were fully explained to her and that she understood their implications.

Difference between Undue Influence and Coercion

In both undue influence and coercion, one party is under the influence of another. (1) In coercion the influence arises from committing or threatening to commit an offence punishable under the Indian Penal Code or detaining or threatening to detain property unlawfully. In undue influence, the influence arises from the domination of the will of one person over another. (2) Cases of coercion are mostly cases of the use of physical force while in undue influence there is mental pressure.

MISREPRESENTATION

Representation is a statement or assertion, made by one party to the other, before or at the time of the contract, regarding some fact relating to it. **Misrepresentation** arises when the representation made is inaccurate but the inaccuracy is not due to any desire to defraud the other party. There is no intention to deceive.

Section 18 of the Contract Act classifies cases of misrepresentation into three groups as follows :

1. Unwarranted Assertion

"The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true."

Example :

A says to B who intends to purchase A's land : "My land produces 12 maunds of rice per bigha." A believes the statement to be true although he did not have sufficient grounds for the belief. Later on it transpires that the land does not produce 12 maunds of rice. This is misrepresentation.

2. Breach of Duty

"Any breach of duty which, without an intent to deceive, gains an advantage to the persons committing it, or anyone claiming under him, by misleading another to his prejudice or to the prejudice of anyone claiming under him." Under this

heading would fall cases where a party is under a duty to disclose certain facts and does not do so and thereby misleads the other party. In English law such cases are known as cases of "constructive fraud."

3. Innocent Mistake

"Causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement."

Consequences of Misrepresentation

In cases of misrepresentation the aggrieved party can :

- (i) avoid the agreement, or
- (ii) insist that the contract be performed and that he shall be put in the position in which he would have been if the representation made had been true.

But if the party whose consent was caused by misrepresentation had the means of discovering the truth with ordinary diligence, he has no remedy.—Sec. 19.

"Ordinary diligence" means such diligence as a reasonably prudent man would consider necessary, having regard to the nature of the transaction.

Example :

A. by a misrepresentation leads *B* erroneously to believe that five hundred maunds of indigo are made annually at *A*'s factory. *B* examines the accounts of the factory, which show that only four hundred maunds of indigo have been made. After this *B* buys the factory. The contract is not avoided by *A*'s misrepresentation.

FRAUD

Definition

The term "fraud" includes all acts committed by a person with a view to deceive another person. "To deceive" means to "induce a man to believe that a thing is true which is false."

Section 17 of the Contract Act states that "Fraud" means and includes any of the following acts :

1. False Statement

"The suggestion as to a fact, of that which is not true by one who does not believe it to be true." A false statement intentionally made is fraud.

2. Active Concealment

"The active concealment of a fact by one having knowledge or belief of the fact." Mere non-disclosure is not fraud where the party is not under any duty to disclose all facts. (See below). But *active concealment* is fraud.

Examples :

- (i) *B*, having discovered a vein of ore on the estate of *A*, *adopts means to conceal, and does conceal*, the existence of the ore from *A*. Through *A*'s ignorance *B* is enabled to buy the estate at an undervalue. The contract is voidable at the option of *A*.—(Illustration (b) to Sec 19).
- (ii) *A* sells by auction to *B* a horse which *A* knows to be unsound, *A* says nothing to *B* about the horse's unsoundness. This is not fraud because *A* is under no duty to disclose the fact to *B*. But if between *B* and *A* there is a fiduciary relationship (for example if *B* is *A*'s daughter) there arises the duty to disclose and non-disclosure amounts to fraud.

3. Intentional non-performance

"A promise made without any intention of performing it."

Example—purchase of goods without any intention of paying for them.

4. Deception

"Any other act fitted to deceive."

5. Fraudulent act or omission

"Any such act or omission as the law specially declares to be fraudulent." This clause refers to provisions in certain Acts which make it obligatory to disclose relevant facts. Thus, under Section 55 of the Transfer of Property Act, the seller of immovable property is bound to disclose to the buyer all material defects. Failure to do so amounts to fraud.

Comment

To constitute fraud, the act complained of must be brought within any of the five above-mentioned categories.

It is to be noted that mere commendation or praising of one's own goods is not fraud. Traders and manufacturers are inclined to speak optimistically of their products, e.g., "X products are the best in the market" or a soap powder which 'washes whiter than white'. Such statements do not amount to fraud, unless a clear intention to deceive is proved.

Can Silence be Fraudulent ?

"Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself equivalent to speech."—Explanation to Sec. 17.

From the above, the following rules can be deduced :

1. The general rule is that mere silence is not fraud.

Examples :

- (i) *A* and *B* being traders enter upon a contract. *A* has private information of a change in price which would affect *B*'s willingness to proceed with the contract. *A* is not bound to inform *B*.
- (ii) *H* sold to *W* some pigs which were to his knowledge suffering from swinefever. The pigs were sold "with all faults" and *H* did not disclose the fever to *W*. Held, there was no fraud. *Ward v. Hobbs*.¹

2. Silence is fraudulent, "if the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak." The duty to speak, *i.e.*, disclose all facts, exists where there is a fiduciary relationship between the parties (father and son ; guardian and ward, etc.). The duty to disclose may also be an obligation imposed by statute. (*Example*—Sec. 55 of the Transfer of Property Act). There is also a duty of making full disclosure in contracts of insurance. Whenever there is a duty to disclose, failure to do so amounts to fraud.

3. Silence is fraudulent where the circumstances are such that, "silence is in itself equivalent to speech".

Example :

B says to *A*, "If you do not deny it, I shall assume that the horse is sound." *A* says nothing. Here *A*'s silence is equivalent to speech. If the horse is unsound *A*'s silence is fraudulent.

Consequences of Fraud

A party who has been induced to enter into an agreement by fraud has the following remedies open to him—Sec 19.

1. He can avoid the performance of the contract.

¹ (1878) 4 A. C. 13

2. He can insist that the contract shall be performed and that he shall be put in the position in which he would have been if the representation made had been true.

Example :

A fraudulently informs B that A's estate is free from encumbrance. B thereupon buys the estate. The estate is subject to a mortgage. B may avoid the contract or may insist on its being carried out and the mortgage debt repaid by A.

3. The aggrieved party can sue for damages. Fraud is a civil wrong or Tort ; hence compensation is payable.

Conditions

Relief for fraud can be obtained only if the following conditions are satisfied.

1. The act must have been committed by a party to a contract or with his connivance or by his agent.

2. The act must have been done with the intention to deceive and must actually deceive. A deceit which does not deceive gives no ground of action.

3. The consent of the party was obtained by the act complained of. A fraudulent act which did not cause the consent to a contract of the party on whom such fraud was practised, does not make the contract voidable.

4. In cases of fraudulent silence, the contract is not voidable if the party whose consent was so caused had the means of discovering the truth ordinary diligence.

5. The remedy of rescinding the agreement is not available in cases of approbation (*i.e.*, acceptance of the agreement) and laches or undue delay in taking action.

DISTINCTION BETWEEN FRAUD AND MISREPRESENTATION

1. *Different Intention* : In misrepresentation there is no intention to deceive. Fraud implies an intention to deceive.

2. *Different Belief* : The difference between misrepresentation and fraud depends on the belief of the person making the statement. If the statement is honest, even though it was wrong, there is only misrepresentation. If the statement is dishonest it is a case of fraud.

3. *Different Rights* : In case of fraud the party aggrieved can rescind the contract (i.e., the contract is voidable at his option). He can also sue for damages. In case of misrepresentation the only remedy is rescission. There can be no suit for damages.

4. *Different Defence* : In case of misrepresentation if the circumstances were such that the aggrieved party might have discovered the truth with ordinary diligence, the contract cannot be avoided. The same is the case where there is fraudulent silence. But in other cases of fraud this is no defence. Even if there were independent sources of discovering the truth which were not availed of, the aggrieved party can rescind the contract and/or file a suit for damages.

CONTRACTS UBERRIMAE FIDEI

Definition

Uberrimae fidei contracts are contracts where law imposes upon the parties the duty of making a full disclosure of all material facts. In such contracts, if one of the parties has any information concerning the subject matter of the transaction which is likely to affect the willingness of the other party to enter into the transaction, he is bound to disclose the information.

Examples

The following contracts come within the class of *uberrimae fidei* contracts.

1. *Contracts of insurance* : The assured must disclose to the insurer all material facts concerning the risk to be undertaken. Upon failure to do so, the contract may be avoided. *London Assurance Co. v. Mansel*.¹

2. *Fiduciary relationship* : Contracts in which parties stand in a fiduciary relation to each other, e.g., contracts between solicitor and client, father and son, etc.

3. *Contracts for the Sale of Immovable Property* : Under Section 55(1) (a) of the Transfer of Property Act, the seller is bound "to disclose to the buyer any material defect in the property or in the seller's title thereto of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover."

¹ (1879) 11 Ch. D. 363

4. *Allotment of shares of companies* : Persons who issue the prospectus of a company have the duty of disclosing all information regarding the company with strict accuracy. (See under Company Law, ch. 3).

5. *Family Settlements* : When family disputes are settled by mutual agreement, each party is bound to disclose any information possessed by him regarding the value of family properties.

MISTAKE

Definition

Mistake may be defined as an erroneous belief concerning something. Consent cannot be said to be "free" when an agreement is entered into under a mistake. An agreement is valid as a contract only when the parties agree upon the same thing in the same sense.

Classification

Mistakes may be (i) mistake of law and (ii) mistake of fact. Mistake of law may again be (a) mistake as to a law in force in India and (b) mistake as to a law not in force in India.

Mistake may be Bilateral or Unilateral. Bilateral mistakes arise when both the parties of the contract make mistakes e.g., regarding the existence of the things or the nature of the transaction. Unilateral mistake arises from one of the parties of the contract. As a rule unilateral mistake does not make one avoid an agreement. But there are cases where such agreement can be avoided. For example in an agreement where there is no consent (see below).

Rules

The Indian Contract Act lays down the following rules regarding mistakes :

1. Mistake of Law

Mistake on a point of Indian law does not affect the contract. Mistake on a point of law in force in a foreign country is to be treated as mistake of fact. A and B make a contract grounded on the erroneous belief that a particular debt is barred by the Indian law of limitation. This is a valid contract. The reason is that every man is presumed to know the law of his own country

and if he does not he must suffer the consequences of such lack of knowledge. But if in the above case, the mistake is related to the law of limitation of a foreign country, the agreement could have been avoided.—Sec. 21.

2. Mistake of fact

An agreement induced by a mistake of fact is void provided the following conditions are fulfilled.—Sec. 20.

- (i) Both the parties to the agreement are mistaken.
- (ii) The mistake is as to a fact essential to the agreement.

Examples :

- (i) *P* agrees to sell to *Q* a specific cargo supposed to be on its way from England to Bombay. It turns out that before the day of the bargain the ship conveying the cargo has been cast away and the goods lost. Neither party was aware of the fact. The agreement is void.
- (ii) *M* agrees to buy from *N* a certain horse. It turns out that the horse was dead at the time of the bargain though neither party was aware of the fact. The agreement is void.
- (iii) *A*, being entitled to an estate for the life of *B*, agrees to sell it to *C*. *B* was dead at the time of the agreement, but, both parties were ignorant of the fact. The agreement is void.
- (iv) *W* offered to purchase certain plots of land belonging to *C* at £2,000. *C* rejected the offer. Later on *C* wrote a letter offering to sell the plots to *W* for "£1,200". His real intention was to make an offer for "£2,100". *W* accepted the offer as made. Held, *W*, was not entitled to enforce the contract, as he knew that the "offer" was made by *C* under mistake. *Webster v. Cecil*.¹

3. Opinion

"An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact."—Explanation to Sec. 20.

Example :

X buys an article thinking that it is worth Rs. 100 while it is actually worth Rs. 50. The agreement cannot be avoided on the ground of mistake.

4. Unilateral Mistake

Section 22 provides that, "A contract is not voidable merely because it was caused by one of the parties to it being under

¹ (1861) 30 Beav. 62

a mistake as to matter of fact." A mistake by one of the parties (Unilateral Mistake) does not generally affect the validity of a contract.

Example :

H contracted with the *N* Corporation to build a number of houses. In calculating the cost of the houses *H* by mistake deducted a particular sum twice over and submitted his estimates accordingly. The Corporation agreed to the figures which were naturally lower than actual cost. Held, the agreement was binding as it stood when the Corporation affixed its seal to it, even though it was based upon erroneous estimates. *Higgins Ltd. v. Northampton Corporation*.¹

But if the mistake is of such a nature as to prevent the existence of free consent, the agreement is void, even though the mistake is unilateral. (See below)

Mistake and Consent

Section 10 of the Act provides that an agreement is valid if it is the result of the free consent of the parties. Section 13 of the Act lays down that two or more persons are said to consent when they agree upon the same thing in the same sense. A mistake may prevent the formation of a real agreement "upon the same thing in the same sense". When one or more of the parties to an agreement suffer from a fundamental error and the consent (apparently given) is not really there, the agreement is void.

A fundamental error, which precludes consent, is sometimes the result of fraud. But fraud is not the necessary or decisive element. An error may arise without the fault of any of the parties to the agreement. Whenever any fundamental error exists, the agreement is void.

Examples of Mistake

Some typical cases of mistake invalidating an agreement are given below.

(a) *Mistakes as to identity of the person contracted with, where such identity is essential to the contract.*

Examples :

- (i) *Blenkarn*, by limiting the signature of reputable firm called *Blenkiron & Co.*, induced another firm *Y* to supply goods to him

¹ (1927) 1 Ch. D. 128

on credit. The goods were then sold to *X*. Held, there was no contract between *Blenkarn* and *Y*, because *Y* never intended to supply *Blenkarn*. Therefore *X* obtained no title to the goods. Because the goods were given on credit the question of identity was essential to the agreement. *Cundy v. Lindsay*.¹

- (ii) A jeweller was insured with a company against loss by theft, with the exception of jewellery 'entrusted to a customer'. A woman, posing as the wife of a wealthy customer, made a few purchases from the jeweller to inspire confidence, and then was allowed to take away two pearl necklets of high value 'on approval' for her supposed husband. She made away with the necklets. The House of Lords held that the loss was covered by the insurance. *Lake v. Simmons*.²

The question of identity must be an essential element of the contract. Where the identity of the party contracted with is immaterial, mistakes as to identity will not avoid a contract. Thus if *X* goes to a shop, introduces himself as *Y* and purchases some goods for cash, the contract valid unless it can be shown that the shopkeeper would not have sold the goods to *X* had he knew that he was not *Y*.

(b) *Mutual mistakes as to the existence of a thing* : All the examples given in the Contract Act under Section 20 come within this category. They have been reproduced above. (Page 71).

(c) *Mutual mistake about the identity or quantity of a thing*.

Examples :

- (i) *X* agreed to buy from *Y* 125 bales of Surat cotton "to arrive ex *Peerless* from Bombay." There were two ships called "*Peerless*" sailing from Bombay, one arriving in October and the other arriving in November. *X* meant the earlier one and *Y* the latter. Held there was no contract. *Raffles v. Wichelhaus*.³ In this case there was no *consensus ad idem* : the parties did not understand the same thing in the same sense.
- (ii) *X* inspected 50 rifles in a shop. Later he telegraphed, "send three rifles." The telegraph clerk by mistake transcribed the message as, "send the rifles." The shopkeeper sent 50 rifles and upon *X*'s refusal to accept, filed a suit for damages. Held, there was no contract. Here the *consensus ad idem* did not arise because of the mistake of a third party. *Henkel v. Pope*.⁴

(d) *Mutual mistake as to the subject-matter of the contract, or the nature of the transaction* : If the contract actually made

¹ (1878) L. R. 3 A. C. 459

² (1927) A. C. 487

³ (1864) 2 H. & C. 906

⁴ (1870) L. R. 6 Ex. 7

is substantially different from the contract the parties intended to make, the contract can be avoided.

Examples :

- (i) *M* an old man of feeble sight, endorsed a bill of exchange thinking it was a guarantee. There was no negligence on his part. Held, there was no contract. *Foster v. Mackinnon*.¹
- (ii) *A* and *B* believing themselves married made a separation agreement under which the husband agreed to pay a weekly allowance to the wife. Later on it transpired that they were not married. In an action by the "wife" for arrears of allowance, it was held that the agreement was void because there was a mutual mistake on a point of fact which was material to the existence of the agreement. *Galloway v. Galloway*.²

(e) *Miscellaneous* : Mistakes may occur for the following causes : the title of property ; quality of the subject matter ; quantity of the goods ; and, the price of the subject.

EXERCISES

1. (a) State when a consent is not said to be free. (Page 59)
(b) What is the effect to such consent on the formation of a contract? ('consequences'—pages 60, 61, 64-65, 69-70, 71-72)
2. What is meant by undue influence? Give two examples. (Page 61)
3. When is consent said to be free? Distinguish between coercion and undue influence. (Pages 59, 65)
4. Define and distinguish 'misrepresentation' and 'fraud'. What remedies are available to the aggrieved party? (Pages 65-71)
5. "Mere silence as to facts is not fraud." Explain with two illustrations. (Page 68)
6. "A contract caused by mistake is void." Explain. (Page 71)
7. Give answers with reasons whether the following cases are instances of fraud :
(a) *A*, sells, by auction, to *B*, a horse which *A* knows to be unsound. *A* declares nothing to *B* about the horse's unsoundness. (Page 66)
(b) Suppose, *B* is *A*'s daughter and has just come of age. Is *A* then bound to tell *B* that the horse is unsound? (Pages 66-67)
(c) *B* says to *A*—"If you do not deny it, I shall take that the horse is sound." *A* says nothing. (Page 68)

¹ (1869) L.R. 4 C.P. 704

² (1914) T. L. R. 531

8. Problems :

- (a) *A* and *B* make a contract on the mistaken belief that a particular debt is barred by the Indian law of limitation. Is the contract void? Is the contract voidable? (Pages 71-72)
 - (b) *A* fraudulently informs *B* that *A*'s house is free from encumbrance. *B* thereupon buys the house. The house is subject to a mortgage. What are the rights of *B*? (Pages 71-72)
 - (c) *A* agrees to sell *B* a specific cargo of goods per *S. S. Malwa* supposed to be on its way from London to Bombay. It turns out that before the day of the bargain *S.S. Malwa* had been cast away and the goods were lost. Discuss the respective rights of *A* and *B*. (Example (i), page 72)
 - (d) *A* agrees to buy from *B* a certain elephant. It turns out that the elephant was dead at the time of the bargain, though neither party was aware of the fact. Discuss the rights of *A* and *B*. (Example (ii), page 72)
 - (e) *A* sells a horse to *B* knowing full well that the horse is vicious. *A* does not disclose the nature of the horse to *B*. Is the sale valid? (Page 66)
 - (f) *A*, a man enfeebled by disease is induced by *B*, his medical attendant, to agree to pay *B* a sum of rupees one lakh for his professional services. Is the agreement valid? Give reasons for your answer. (Page 61-62)
 - (g) *A* buys a piece of ordinary cloth from *B*. *A* thinks erroneously that the cloth is of high quality. *B* knows that *A* is under a mistake but keeps quiet on this matter. When *A* realises his mistake, he wants to set aside the contract on the ground that *B* had knowingly committed fraud in not pointing out his mistake. Discuss if the contract is voidable. (Page 73)
 - (h) *A* sells *B* his horse for Rs. 500. The horse is blind in one eye, but *B* does not know this until after the sale is completed. Is *A* liable to *B* on the ground of fraud? (Page 67)
 - (i) *X* sold a mare to *B* which had a cracked hoof. *X* filled up the hoof in order to prevent detention even after diligent examination. What is the right of *B*? (Para 2, page 67)
9. Objective questions. Give short answers. (2 marks) :
- (i) Give two examples where undue influence has been exercised in the contract. (Page 61)
 - (ii) Suicide is no crime. True or false? (Page 61)
 - (iii) Does silence as to fact amount to fraud? If so, give one example. (Page 68)

UNLAWFUL CONSIDERATION AND OBJECT

Definition

An agreement will not be enforced by the court if its object or the consideration is unlawful. By the expression, "object of an agreement" is meant its 'purpose' or 'design'. The object and the consideration must both be lawful, otherwise the agreement is void.

Unlawful Agreements

According to Section 23 of the Act the consideration and the object of an agreement are unlawful in the following cases :

1. *If it is forbidden by law* : An act or an undertaking is forbidden by law when it is punishable by the criminal law of the country or when it is prohibited by special legislation or regulations made by a competent authority under powers derived from the legislature.¹ If the object of an agreement or the consideration is the doing of an act forbidden by law, the agreement is void.

2. *If it is of such a nature that, if permitted, it would defeat the provisions of any law* : If the object or the consideration of an agreement is of such a nature that it would indirectly lead to a violation of the law, the agreement is void.

Examples :

- (i) A's estate is sold for arrears of revenue under the provisions of an act of the legislature by which the defaulter is prohibited from purchasing the estate. B, upon an understanding with A, becomes the purchaser and agrees to convey the estate to A upon receiving from him the price which B has paid. The agreement is void as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.
- (ii) The plaintiff entered into a contract of service with the defendant by which it was agreed that he should be paid the sum of £13 a week as salary, and a further £6 per week for 'expenses'. His

¹ Pollock and Mulla. *Indian Contract Act*. p. 138

expenses were very much lower, therefore this provision was merely a device to defraud the Income Tax Authority. The Court of Appeal in England, held that the two provisions of the contract cannot be severed and the whole contract was void. *Napier v. National Business Agency Ltd.*¹

- (iii) *P* let a flat to *R* at a rent of £1,200 a year. To reduce the Municipal tax he entered into two agreements with *R*. One, by which the rent was stated to be £450 only and the other by which *R* agreed to pay £750 for services in connection with the flat. In a suit filed against *R* to recover £750, it was held that the agreement was made to defraud the municipal authority and was void and *A* cannot recover the money. *Alexander v. Rayson*.²

3. *If it is fraudulent* : An agreement whose object is to defraud others is void.

Examples :

- (i) *A*, *B* and *C* enter into an agreement for the division among them of gains acquired or to be acquired by them by fraud. The agreement is void.
- (ii) *A*, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for *B* a lease of land belonging to his principal. The agreement between *A* and *B* is void, as it implies a fraud by concealment by *A* on his principal.

4. *If it involves or implies injury to the person or property of another*. If the object of an agreement is to injure the person or property of another, it is void.

Examples :

- (i) An agreement by the proprietors of a newspaper to indemnify the printers against claims arising from libels printed in the newspaper is void. *W. H. Smith & Sons v. Clinton*.³
- (ii) An agreement by which a debtor promised to do manual labour for the creditor so long as the debt was not repaid in full has been held to be void under this clause. *Ram Sarup v. Bansi*.⁴

5. *If the court regards it as immoral*. An agreement whose object is immoral, or where the consideration is immoral, is void.

Examples :

- (i) *X* who is *B*'s Mukhtear promises to exercise his influence with *B* in favour of *C* and *C* promises to pay Rs. 1,000 to *X*. The agreement is void because it is immoral.
- (ii) *D* agrees to let her daughter to hire to *B* for concubinage. The agreement is void.

¹ (1951) 2 All E. R. 264

² (1936) 1 K. B. 169

³ (1908) 26 T. L. R. 34

⁴ (1915) 42 Cal 742

(iii) *P* let a cab on hire to *B* a prostitute, knowing that it would be used for immoral purposes. The agreement is void and he cannot recover the hire. *Pearce v. Brooks*.¹

(iv) A man who knowingly lets out his house for prostitution cannot recover the rent.

6. *If the court regards it as opposed to public policy* : An agreement which is injurious to the public or is against the interests of the society is said to be opposed to public policy. Public policy is not capable of exact definition and therefore courts do not usually go beyond the decided cases on the subject. It has been said in the House of Lords that, "public policy is always an unsafe and treacherous ground for legal decision", per Lord Davey. *Janson v. Driefstein Consolidated Mines*.² Courts are generally disinclined to create a new item in the list of agreements against public policy. *Gherulal Parakh v. Mahadeodas & others*.³

The following agreements have been held to be against public policy : trading with the enemy ; traffic in public offices ; interference with the course of justice etc. These agreements are discussed below.

AGREEMENTS AGAINST PUBLIC POLICY

1. Trading with the enemy

It is a well-settled principle of law that an agreement between citizens of two countries at war with each other is void and inoperative. In India such agreements are allowed where specially permitted by the government. ("Alien"—p. 56)

2. Agreements interfering with the course of justice

Agreements for stifling or hushing up prosecutions are bad in law. When an offence has been committed, the guilty party must be prosecuted and any agreement which seeks to prevent the prosecution of such a person is opposed to public policy and is void. But under the Indian criminal law there are certain cases which can be compromised or compounded. These are mostly minor offences like simple hurt. An agreement for the compromise of such a case is valid. In civil cases compromises and

¹ (1866) L. R. 1 Ex. 213

² (1902) A. C. 484

³ (1959) (II) S.C.A. 342 (Supreme Court)

settlements are not only allowed but also are encouraged. An agreement to refer present or future disputes to arbitration is a valid agreement. But an agreement varying the statutory period of limitation is not valid.

ChamPERTY and Maintenance

When a person agrees to help another by money or otherwise in litigation in which he is not himself interested, it is called **Maintenance**. When a person helps another in litigation in exchange of a promise to hand over a portion of the fruits of the litigation, if any, it is called **Champerty**.

Examples :

- (i) *P* files a suit against *Q* for the recovery of a house. *X* promises to advance Rs. 1,000 to *P* for the costs of the litigation and *P* promises to give to *X* a portion of the house if he is successful in his suit. This is a champertous agreement.
- (ii) An advocate entered into an agreement with his client by which the latter promises to pay to the former fifty per cent of whatever is recovered from the decree of the court. The agreement is champertous.

According to English law an agreement which amounts to Champerty is void because it is against public policy to promote litigation. But an agreement which amounts to Maintenance only, is good if it can be shown that the motive underlying the help given is purely charitable. It has been held by the Privy Council in the case of *Ramcoomar v. Chandrakanta*,¹ that the English doctrines of Champerty and Maintenance are not applicable to India. In India, an agreement to finance litigation in return of a portion of the results of the litigations is valid provided the litigation was instituted with a *bona fide motive*. *Bhagwat Dayal Singh v. Debi Dayal Sahu*.² If, however, the litigation was inspired by a malicious motive or is of a gambling character, the agreement is bad.

3. Traffic in public offices

Agreements tending to injure the public services are void as being against public policy.

Examples :

- (i) An agreement the object of which is to procure public post is void.
- (ii) An agreement to share the emoluments of a public office is void.

¹ (1876) 4 I.A. 23 (Privy Council) ² (1908) 35 I. A. 48 (Privy Council)

- (iii) An agreement to sell a religious office e.g., that of a shebait or a mutawali is void.
- (iv) The secretary of certain college promised Parkinson that if he donates £3,000 to the college, he would use his influence to secure a knighthood for him. Parkinson made the donation but did not get a knighthood and sued for the recovery of the money. Held, the action failed because the agreement was against public policy. *Parkinson v. College of Ambulance Ltd.*¹
- (v) P promises to obtain for Q an employment in the public service and Q promise to pay Rs. 1,000 to P. The agreement is void.
- (vi) A paid B, a public servant, a certain amount inducing to him to retire from service, thus A can be appointed in his place. The agreement is void.

4. Agreement creating an interest opposed to duty

It has been held in several cases that if a person enters into an agreement whereunder he will have to follow a course of action which is against his public or professional duty, the agreement is against public policy and is bad.

Example :

An agreement by an agent whereby he would be enabled to make secret profits ; an agreement for the purchase of property by a public officer where such purchase is prohibited by law ; an agreement by a newspaper proprietor not to comment on the conduct of particular person. *Neville v. Domination of Canada News Co.*²

5. Agreements restraining personal freedom

Agreements unduly restraining personal liberty have been held to be void as being against public policy.

Examples :

- (i) An agreement by a debtor to do manual work for the creditor so long as the debt was not paid in full.
- (ii) An agreement whereby the debtor promised to a moneylender that he will not change his residence or his employment or agree to a reduction of his salary without the consent of the money-lender was held to be void. *Horwood v. Millar's Timber Co.*³

6. Agreements interfering with parental duties

The authority of father over children and of a guardian over his ward is to be exercised in the interest of the children and the

¹ (1925) 2 K.B. 1

² (1915) 3 K. B. 556

³ (1917) 1 K. B. 305

wards respectively. The authority of a father cannot be alienated irrevocably and any agreement purporting to do so is void.

Example :

The father of two minor sons agreed to transfer their guardianship to Mrs. Annie Besant, on an irrevocable basis. Subsequently he wanted to rescind the agreement. Held, guardianship cannot be permanently alienated. So he got back their custody. *Giddu Narayanish v. Mrs. Annie Besant*.¹

7. Agreements interfering with marital duties

Agreements which interfere with the performance of marital duties are void as being against public policy.

Examples :

- (i) An agreement to lend money to a woman in consideration of her getting a divorce and marrying the lender is void. *Roshan v. Mohomad*.²
- (ii) An agreement that the husband will always stay at the mother-in-law's house and that the wife would never leave her parental house is void. *Tikyat v. Monohar*.³

8. Marriage brokerage agreements

According to English law an agreement to pay brokerage to a person for negotiating a marriage, is void because it is against public policy. The principle underlying this rule is that marriages should take place according to the free choice of parties and such choice should not be interfered with by third parties acting as brokers. In India, however, marriages are in most cases negotiated by the parents of the parties and the custom of appointing agents or brokers for finding out a suitable match is well-established. Therefore there is some difference of opinion on the question whether the English rule regarding marriage brokerage contracts should be applied here.

In an old case, the Calcutta High Court held that an agreement to remunerate a third person in consideration of negotiating a marriage is contrary to public policy and cannot be enforced. *Bakshi Das v. Nadu Das*.¹

An agreement to pay money to the parent of a minor to give the minor in marriage is void and illegal.

¹ (1915) 38 Mad 80

² P. R. 46 of 1887

³ 28 Cal 751

VOID AGREEMENTS

An agreement can be void because of mistake, lack of consideration, want of capacity etc. A list of void agreements is given below :

- (1) Lack of Capacity—Sec. 11 (See p. 49)
- (2) Mutual Mistake of Fact—Sec. 20 (See p. 72)
- (3) Unlawful Consideration or Object—Sec. 23 (See p. 77)
- (4) Consideration or Object partly unlawful—Sec. 24 (See p. 92-93)
- (5) Agreements without consideration—Sec. 25 (See p. 41-42)

Void agreements declared by the Indian Contract Act in sections 26, 27, 28, 29, 30 and 56. These agreements are explained below :

- (6) Agreements in restraint of trade.—Sec. 27 (See p. 83)
- (7) Agreements in restraint of legal proceedings—Sec. 28 (See p. 87-88)
- (8) Uncertain Agreement.—Sec. 29 (See p. 88-89)
- (9) Agreements by way of wager.—Sec. 30 (See p. 89)
- (10) Impossible Acts.—Sec. 56 (See p. 92)
- (11) Agreement Contingent on impossible event.—Sec. 36 (See p. 98)
- (12) Reciprocal promises where there are void promises.—Sec. 57 (See p. 104-107)

Agreements in restraint of trade

"Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void"—Sec. 27

"Public policy requires that every man shall be at liberty to work for himself and shall not be at liberty to deprive himself of the fruit of his labour, skill or talent, by any contract that he enters into." *Fraser v. Bombay Ice Company*.²

According to English law as laid down in *Nordenfelt v. Maxim Nordenfelt Gun Co.*³ contracts which impose *unreasonable* restraints upon the exercise of a business, trade or profession are void while those which impose *reasonable* restraints are valid.

¹ 1 C. L. J. 261

² 29 Bom 107

³ (1894) A. C. 535

But in India restraints are not valid except in the few cases provided by law. (See below)

Examples :

- (i) *X* and *Y* carried on business as braziers in a certain locality in Calcutta. *X* promised to stop his business in that locality in consideration of *Y* paying to him Rs. 900 which he had disbursed as advances to his workmen. *X* stopped his business but *Y* failed to pay him the promised money. *X* filed a suit to recover Rs. 900. The court held that the agreement was void under Sec. 27 and nothing could be recovered on the basis of that agreement. *Madhav v. Rajcoomer*.²
- (ii) *X* garage agreed to deal only with the products of Esso Petroleum Co. and to work according to the company's rules for $4\frac{1}{2}$ years. Garage *Y* with Esso had an agreement containing the same terms but for 21 years. *Y* was also mortgaged to the Esso against a loan. The House of Lords held that the agreement with *Y* was unreasonable and void. But the agreement with *X* was held reasonable and valid. *Esso Petroleum Co. v. Harper's Garage (Stouport) Ltd.*³

Cases in which restraint of trade is valid in India

An agreement is restraint of trade is valid in the following cases :

I. Statutory Exceptions

(i) *Sale of Goodwill* : "One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any one deriving title to the goodwill from him, carries on a like business therein ; provided that such limits appear to the court to be reasonable, regard being had to the nature of the business"—Exception 1, Sec. 27, Contract Act.

The seller of the goodwill of a business can be restrained from carrying on a similar business within specified local limits, provided the restraint is reasonable.

Examples :

- (a) *X* buys from *Y* the goodwill of the business of plying ferry boats across certain ghats on a river and *Y* promises not to ply his boats at those ghats. The restraint is valid.
- (b) *C* after selling the goodwill of his business to *D* promises not to carry on similar business "anywhere in the world". The restraint is void.

¹ (1874) 14 B L R. 76

² (1968) A. C. 269

- (c) *E* a seller of imitation jewellery sells his business to *D* and promises not to carry on business in "imitation jewellery and real jewellery". Held, the restraint was valid as regards imitation jewellery, not as regards real jewellery. *Goldsoll v. Goldman*.¹

(ii) *Partner's competing business* : A partner of a firm may be restrained from carrying on a similar business, so long as he remains a partner.—Sec. 11 (2) Partnership Act.

(iii) *Rights of outgoing partner* : A partner may agree with his partners that on ceasing to be a partner he will not carry on a similar business within a specified period or within specified local limits.—Sec. 36 (2), Partnership Act.

(iv) *Partner's similar business on dissolution* : Partners may, in anticipation of the dissolution of the firm, agree that all or some of them shall not carry on similar business within a specified period or within specified local limits.—Sec. 54, Partnership Act.

(v) *Rights of buyer and seller of goodwill* : The sellers of the goodwill (i.e., the partners of the firm) or anyone or more of them may carry on a business competing with that of the buyer and may advertise the business. A partner or partners cannot (a) use the firm name, (b) represent himself as carrying on the business of the firm, or (c) solicit the custom of persons who were dealing with the firm before its dissolution (unless there is an agreement with the buyer of goodwill permitting any of these).—Sec. 55 (2)

Lambert v. Gurney →

(vi) *Agreements in restraint of trade* : The buyer of the goodwill may further protect himself from the competition of the old partners by entering into an agreement with any partner prohibiting such partner from carrying on any business similar to that of the firm within a specified period or within specified local limits. Such an agreement shall be valid if the restrictions imposed are reasonable (not withstanding the fact that the agreement may amount to restraint of trade).—Sec. 55(3)

II. Legal decisions

(a) Trade combinations

It has been held in many English cases that an agreement between a group of manufacturers or traders regarding the

¹ (1915) 1 Ch. D 292

conditions of an industry or the price, is binding although it is in restraint of trade, provided the agreement is in the interest of the parties themselves. Thus, pools and cartels whose objects are to promote the welfare of the parties themselves by regulating competition are valid agreements.

Examples :

- (i) Certain ice manufacturers entered into agreement not to sell ice below a certain minimum price. The agreement was held to be valid. *Fraser & Co. v. Bombay Ice Co.*¹
- (ii) It was agreed among members of a society of hop growers that each member would deliver all hops grown by him to the society which would market the hops and divide the profits among the members. Held, the agreement was valid. *English Hop Growers v. Derring*.²

But a trade combination is not valid if it is against the public interest or if it tends to create monopoly. *Attorney General of Australia v. Adelaide S. S. Co.*³ It was observed in *Vancouver Brewing Co. v. V. Breweries*⁴ that, "Liberty of trade is not an asset which the law will permit a person to barter away except in special circumstances."

(b) Negative stipulations in service contracts

A person while in service with another may, by the terms of his service, be prevented from accepting other engagements. For example, a doctor employed in a hospital may be debarred from private practice. Such negative stipulations in service contracts are not considered to be in restraint of trade and are therefore valid.

Sometimes, however, employers seek to restrict former employees from engaging themselves in similar occupations for some period after the termination of their services. In English law such stipulations have been held to be valid if they are for the protection of the employer's interest. Thus in *Fitch v. Dewes*⁵ the articulated clerk of a solicitor stipulated that he would not practice as a solicitor within seven miles of a certain place, after he became qualified as a solicitor and left his previous employment. The agreement was held to be valid.

The Indian law regarding restraint of trade is, however,

¹ 29 Bom 107

³ (1914) A. C. 461

⁵ (1921) 2 A.C. 158

² (1928) 2 K. B. 174

⁴ (1934) A. C. 181

stricter. It has been held in, *Brahmaputra Tea Company v. Scarth*,¹ that an agreement restraining an employee from taking service or engaging in any similar business for a period of five years from the date of the termination of his service with his previous employers is invalid even though the restrictions only extended to a distance of 40 miles from the previous place of work. In *Cohen v. Wilkie*,² an actor was brought out from England under a contract containing a stipulation that he would not play at another theatre in India during his tour. The stipulation was held to be void as being in restraint of trade.

A decision of the Supreme Court : A company was manufacturing a special yarn with the collaboration of a foreign undertaking on the condition that the company would maintain secrecy of all technical information and would have secrecy agreements with its employees. One employee was appointed for five years with the condition that during this period he would not take service any where even if he left this service. Shelat, J. of the Supreme Court held that the agreement is valid. *Niranjan Shankar Golikari v. Century Spinning & Manufacturing Co. Ltd.*³

3. Agreements in restraint of legal proceedings *Legal* [Amended]

Private persons cannot by agreement alter their personal law or the statute law. Section 28 of the Act provides that, "Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent."

The effect of Section 28. can be summed up as follows : An agreement which prohibits a person from taking judicial proceedings, in respect of any right arising from a contract, is void. Similarly any limitation of the time within which he may enforce his rights is void. Section 28, is subject to two exceptions :

Exception. 1—Future disputes : An agreement by the parties to a contract to refer future disputes to arbitration is valid and binding. An agreement to settle disputes by arbitration prevents the parties from getting the dispute adjudicated by a court of law but nevertheless, such an agreement is binding.

¹ 11 Cal 545

² 16 C. W. N. 534

³ AIR (1967) Supreme Court 1098

Exception 2—Pending disputes : An agreement in writing to refer a *pending* dispute to arbitration is not rendered illegal by Section 28. The section does not affect the law relating to arbitration.

It is to be noted that Section 28 applies only to rights arising from a contract. It does not apply to cases of civil wrong or torts.

Section 28 dealing with the above question renders void two kinds following agreement as per Amendment Act 1996 :

(1) An agreement which wholly or partially prohibits any party from enforcing his rights under or in respect of any contract is void to that extent.

(2) Agreements which curtail the period of limitation prescribed by the law of limitation are void because their object is to defeat the provision of law.

Similarly an agreement purporting to cast the jurisdiction of courts is contrary to public policy. But an agreement between two or more parties to refer to arbitration any disputes which have arisen or which may arise between them is perfectly valid.

4. Uncertain Agreement

“Agreements the meaning of which is not certain, or capable of being made certain, are void,”—Sec. 29.

An agreement cannot be enforced unless the obligations created by it are clearly understood. (See p. 33)

Examples :

- (i) *A* agrees to sell to *B* “one hundred tons of oil”. There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.
- (ii) *A*, who is a dealer in cocoanut oil only, agrees to sell to *B* “one hundred tons of oil”. The nature of *A*’s trade affords an indication of the meaning of the words and the agreement is valid.
- (iii) *A* agrees to sell to *B* “all the grain in my granary at Rammagar”. There is no uncertainty here to make the agreement void.
- (iv) *A* agrees to sell to *B* “one thousand maunds of rice at a price to be fixed by *C*”. As the price is capable of being made certain, there is no uncertainty here to make the agreement void.
- (v) *A* agrees to sell to *B* “my white horse for Rs. 500 or Rs. 1,000”. There is nothing to show which of the two prices was to be given. The agreement is void for uncertainty.
- (vi) *L* promises to pay five pounds more after the purchase of a horse if the horse “proved lucky”. The promise is too vague to be enforced.

for it is not possible for the courts to decide when a horse is lucky
Guthing v. Lynn.¹

"Agreeing to Agree" : An agreement to *enter into an agreement in the future* is void for uncertainty unless all the terms of the proposed future agreement are agreed expressly or by implication. "Unless all material terms of the contract are agreed, there is no binding obligation. An agreement to agree in future is not a contract nor is there a contract if a material term is neither settled nor implied by law and the document contains no machinery for ascertaining it." Lord Maugham in *Foley v. Classique Coaches Ltd.*² (Anson, *Law of Contract*, ch. II).

Examples :

- (i) An actress was engaged for a provincial tour. The agreement also provided that if the play was brought to London she would be engaged at a salary "to be mutually agreed upon". Held, there was no contract. *Lofius v. Roberts*.³
- (ii) A company agreed with V that on expiration of V's existing contract, they would "favourably consider" the renewal of his contract. Held, no obligation was created to renew the contract. *Montreal Gas Co. v. Vasey*.⁴

5. Agreements by way of wager

Definition : A wager is an agreement by which money is payable by one person to another on the happening or non-happening of a *future, uncertain event*. "The essence of gaming and wagering is that one party is to win and the other to lose upon a future event; which at the time of the contract is of an uncertain nature—that is to say, if the event turns out one way A will lose but if it turns out the other way he will win." *Thacker v. Hardy*.⁵

Characteristics of wagering agreements :

1. The consideration for the promise under a wagering agreement is to pay or get money.
2. The money is payable on the happening or the non-happening of an event.
3. The agreement depends on a future and uncertain event.

¹ (1831) 2 B & Ad. 232

² (1934) 2 K. B. 1

³ (1902) 18 T.L.R. 532

⁴ (1900) A. C. 595

⁵ (1878) 4 Q.B.D 685

4. The essence of gaming and wagering is that one party is to win and the other lose.

5. In wagering agreement no party has control over the event.

6. Commercial transactions are valid, but to pay price differences in a wagering agreement is void.

Commercial transactions : "In order to constitute a wagering contract neither party should intend to perform the contract itself, but only to pay the differences." *Sukherdoss v. Govindoss*.¹ Commercial transactions are not speculative if there is a clear intention to deliver the goods.

Examples of wagering agreements :

- (i) *P* agrees with *Q* that if there is rain on a certain day *P* will pay *Q* Rs. 50. If there is no rain *Q* will pay *P* Rs. 50.
- (ii) A bet on a horse race is wagering transaction, although horse racing is permitted by some local law and although there may be official agencies through which bets may be placed and the winnings collected.
- (iii) A share market transaction, in which there is no intention to give or take delivery of the shares and where the parties intend to deal only with the differences in prices, is a wagering transaction.
- (iv) Certain transactions were settled by handing over Delivery Orders and cheques. There is no evidence that actual delivery of goods was ever effected. Held, the transactions are speculative. *Nirmal Trading Co. v. The Commissioner of Income-Tax (Central) Calcutta*.²
- (v) **Lotteries**—A lottery is a game of chance. Therefore an agreement to buy a ticket for a lottery is a wagering agreement. A lottery may be authorised by the government. The only effect of such authorisation is to exempt the persons conducting the lottery from criminal prosecutions but it remains a wagering transaction. *Dorabji v. Lance*.³
- (vi) **Cross-word Puzzles**—In an English case it has been held that a cross-word puzzle, in which prizes depend upon sameness of the competitor's solution with a previously prepared solution kept with editor of a newspaper, is a lottery and therefore a wagering transaction. *Coles v. Odham's Press*.⁴

Exceptions

It has been held that the following transactions are not wagers :

(i) **Shares** : Share market transactions in which there is clear intention to give and take delivery shares.

¹ (1928) 55 I.A. 32 (Privy Council) ² AIR (1980) Supreme Court 234

³ (1918) 42 Bom 676

⁴ (1936) 1. K. B. 416

(ii) *Games of skill* : Prizes and competitions which are games of skill, e.g., picture puzzles ; athletic competitions etc. An agreement to enter into a wrestling contest, in which the winner was to be rewarded by the whole of the sale-proceeds of tickets and the party failing to appear on that day would have to forfeit Rs. 500 was held not be a wagering agreement. *Babasaheb v. Rajaram*.¹

(iii) *A statutory exception* : An agreement to contribute to the payment of a prize of the value of Rs. 500 or upwards to the winners of a horse race, is valid. This is statutory exception laid down in section 30 of the Contract Act.

(iv) *Contract of Insurance* : A contract of insurance is not a wagering agreement. (See 'Law of Insurance', ch. 1)

(v) "*Badla*" : "*Badla*" transactions are exactly similar to the transaction of 'conversion' or 'carrying over' in the terminology of the Stock Exchanges with regard to dealings in securities. Mere agreement to engage in speculation on the rise and fall in prices of goods is not necessarily a wagering contract. But in a case this contract was held void under Section 23 of Contract Act because it prohibited forward contracts by a statute on this subject. *Pratapchand Nopaji v. Kotrike Venkata Setty & Sons etc.*²

The effects of a wagering agreement

An agreement by way of wager is void. It will not be enforced by the courts of law. Section 30 provides as follows : "Agreements by way of wager are void ; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide by the result of any game or other uncertain event on which any wager is made."

In the State of Maharashtra and of Gujarat wagering agreements are, by a local statute, not only void but also illegal.

In the case of void agreements, collateral agreements, i.e., agreements which are subsidiary or incidental to the main agreement, are valid. Therefore, though wagering agreements are void, transactions collateral to such agreements are valid. *Gherulal Parakh v. Mahideodas Maiya & ors.*³

Examples :

- (i) Money lent for the purpose of gambling or for paying a gambling debt even if advanced with knowledge of the purpose for which the money is required can be recovered.

¹ (1931) 33 Bom L.R. 260

² AIR (1975) Supreme Court 1223

³ 1959 (11) S.C.A. 342 (Supreme Court)

- (ii) Where one of several holders of a Derby Sweep ticket sold half of his share to another, the other could enforce his claim in the prize by suit. *Gough v. Leneham*.¹
- (iii) *M* lost Rs. 8,500 to *L* on horse races. Subsequently *M* executed a Hundi for same amount in favour of *L* to prevent *M* being posted as a defaulter in his club. *L* filed a suit on the Hundi. *M* pleaded that it was a wagering transaction and that the consideration was unlawful. Held, a wagering agreement is void but does not affect the collateral transaction. *Leicester & Co. v. S. P. Mullick*.²

6. Impossible Acts

“An agreement to do an act impossible in itself is void.—Sec. 56 (Para 1).

Examples :

- (i) *A* agrees with *B* to discover treasure by magic. The agreement is void.
- (ii) *A* contracts to marry *B*, being already married to *C*, and forbidden by the law to which he is subject to practice polygamy. The contract is void. But *A* must make compensation to *B* for the loss caused to her by the non-performance of the promise.

The examples cited above are cases of Pre-contractual Impossibility.

A contract may become impossible to perform by subsequent events. These cases are discussed under “Termination of Contracts” in ch. 11. They can be called Post-contractual Impossibility.

OBJECTS OR CONSIDERATION UNLAWFUL IN PART

If the consideration or object is partially unlawful, the following rules will apply.

1. If there are several objects but a single consideration the agreement is void if any one of the objects is unlawful.—Sec. 24.
2. If there is a single object but several considerations, the agreement is void if any one of the considerations is unlawful.—Sec. 24.

The two above rules with the case where the agreement cannot be divided into two parts—a part which is legal and a part which is illegal.

¹ 25 I.C. 355

² (1923) Cal. 445

Example :

A promises to superintend, on behalf of *B*, a legal manufacture of indigo, and an illegal traffic in other articles. *B* promises to pay *A* a salary of Rs 10,000 a year. The agreement is void. Here a part of the object is legal and a part is illegal but there is a single consideration.

3. Where there is a reciprocal promise to do things legal and also other things illegal, and the legal part can be separated from the illegal part the legal part is a contract and the illegal part is a void agreement.—Sec. 57.

Example :

A and *B* agree that *A* shall sell *B* a house for Rs. 10,000 but if *B* uses it as a gambling house, he shall pay *A* Rs. 50,000 for it. The first part of the agreement is valid, the second part invalid.

4. In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.—Sec. 58.

Example :

A and *B* agree that, *A* shall pay Rs. 1,000 for which *B* shall afterwards deliver to *A*, either rice or smuggled opium. This is a valid contract to deliver rice and a void agreement as to opium.

EXERCISES

1. When is an agreement said to be against public policy? Give five examples of agreements which are against public policy.
(Pages 79-83)
2. Examine the validity of agreements with consideration and object unlawful in part.
(Page 92)
3. State the law in restraint of profession, trade, or business. Give illustrations.
(Pages 83-84, 88-89)
4. What are the exceptions to the rule that contracts in restraint of trade are void?
(Pages 84-87)
5. What are the agreements which have been expressly declared to be void as per the Indian Contract Act., 1872? (Pages 83-93)
6. What are agreements by way of wager? What are the legal consequences that flow from an arrangement by way of wager?
(Pages 89-93)
7. Define 'Wagering Contract'. Is there any exception?
(Pages 89-93)
8. State with reasons, whether the following agreements are void or valid : (a) *A* agrees to sell to *B* "one thousand maunds of rice at a price to be fixed by *C*".
(Example (iv), page 88)

- (b) *A* grants lease of certain premises in Calcutta to *B* knowing that the premises will be used for the purpose of installing machinery for minting base coin. (Para 1, page 77)

9. *Problems* :

- (a) *A* enters into a wagering agreement and borrows Rs. 100 for the purpose. Void or valid ? (Page 92)
- (b) *A* agrees to sell to *B* "my white horse for Rs. 500 or 1000." Is the agreement valid ? (Page 88)
- (c) *X* enters into a contract with *Y* for the sale of goods to be delivered at a future date. Is it a wagering Contract ? (It is a valid Contract, not a Wagering Contract).

10. Objective questions. Give short answers.

- (i) An agreement to share the emoluments of a public office is void. True or false ? (Para 3, page 80)
- (ii) *X* agrees with *Y* to discover treasure by magic. Is the contract valid ? (Para 6, page 92)

Definition

"A contingent contract is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen."—Sec. 31.

Example :

A contracts to pay B Rs 10,000 if B's house is burnt. This is a contingent contract. [Illustration to Sec. 31]

A contingent contract contains a conditional promise. A promise is "absolute" or "unconditional" when the promisor undertakes to perform it in any event. A promise is "conditional" when performance is due only if an event, collateral to the contract, does or does not happen. "Collateral" means, "subordinate but from same source, connected but aside from main line".

Meaning of Collateral Event

According to Pollock and Mulla¹ a collateral event means an event which is, "neither a performance directly promised as part of the contract, nor the whole of the consideration for a promise." From this explanation it follows that the following contracts are not contingent contracts :

(a) X promises to pay Rs. 100 to any person who recovers some property lost by X.

(b) X promises to pay Y Rs. 1,000 if he marries Z.

In example (a) there is no contract until and unless somebody finds the lost property. In example (b) there is an offer by X which becomes a binding promise when Y marries Z.

But a contract, whereby A promises to pay B Rs. 10,000 if B's house is burnt, is a contingent contract because the liability of A arises only when B's house is burnt. This is an event collateral to the main contract because the burning of B's house is not the performance required from B under the contract nor is it the consideration obtained from B. It is an independent event.

¹ Pollock and Mulla, *Indian Contract Act*. p. 235

Characteristic of Contingent Contracts

From the above discussion it follows that there are two essential characteristics of contingent contracts :

(a) The performance of such contracts depends on a contingency, i.e., on the happening or non-happening of the future event.

(b) In a Contingent Contract, the event must be collateral i.e., incidental to the contract.

(c) The contingency is uncertain. If the contingency is bound to happen, the contract is due to be performed in any case and is not therefore a contingent contract.

Contingency dependent on act of party

The performance of a contingent contract depends on the happening or non-happening of a collateral event. The word 'event' includes an 'act'; and the 'act' may be of a party to the contract or of a third party. Thus a promise to buy certain goods if the party's engineer approves of them, is valid. Here the engineer's approval is the act on which the performance of the promise to purchase is contingent. But if the performance of a promise is contingent upon the mere will and pleasure of the promisor, there is no contract.¹

Examples :

- (i) Life insurance, indemnity and guarantee are examples of Contingent Contract.
- (ii) A promise to pay, what a third party X shall determine, is valid.
- (iii) The plaintiff entered into a contract for the supply of timber to the Government. One of the terms of the contract was that the timber would be rejected if not approved by the Superintendent of the Gun Carriage Factory for which the timber was required. The timber supplied was rejected. Held, on a suit for breach of contract, that it was not open to the plaintiff to question the Superintendent's decision. *Secretary of State for India v. Arathoon*.²
- (iv) In the case of goods to be manufactured to order, it may be a term of the contract that the goods shall be to the customer's approval. In such a case the customer's judgment, acting *bonafide* and not capriciously, is decisive. *Andrews v. Belfield*.³
- (v) A promise, to pay for a service whatever the promisor himself thinks right or reasonable, is no promise. *Roberts v. Smith*.⁴

¹ Pollock and Mulla, *op. cit.*, p. 236

³ (1857) 2 C. B. N. S. 779.

² (1879) 5 Mad. 173

⁴ (1859) 4 H. & N. 315

Rules regarding Contingent Contracts

Sections 32 to 36 of the Contract Act contain certain rules regarding contingent contract. They are summarised below.

1. *The happening of a future uncertain event* : Contracts contingent upon the happening of a future uncertain event, cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void.—Sec. 32.

Examples :

- (i) *A* makes a contract with *B* to buy *B*'s horse if *A* survives *C*. This contract cannot be enforced by law unless and until *C* dies in *A*'s lifetime.
- (ii) *A* makes a contract with *B* to sell a horse to *B* at a specified price, if *C*, to whom the horse has been offered, refuses to buy it. The contract cannot be enforced by law unless and until *C* refuses to buy the horse.
- (iii) *A* contracts to pay *B* a sum of money when *B* marries *C*. *C* dies without being married to *B*. The contract becomes void.

2. *The non-happening of an uncertain future event* : Contracts contingent upon the non-happening of an uncertain future event, can be enforced when the happening of that event becomes impossible, and not before—Sec. 33.

Example :

A agrees to pay *B* a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.

3. *When event to be deemed impossible* : If a contract is contingent upon how a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies.—Sec. 34

Example :

A agrees to pay *B* a sum of money if *B* marries *C*. *C* marries *D*. The marriage of *B* to *C* must now be considered impossible although it is possible that *D* may die and that *C* may afterwards marry *B*.

4. *The happening of an event within a fixed time* : Contracts contingent upon the happening of an event within a fixed time, become void if, at the expiration of the fixed time, such event has not happened, or if, before the time fixed, such event becomes impossible.

The non-happening of an event within a fixed time : Contracts contingent upon the non-happening of an event within a fixed time may be enforced by law when the time fixed has expired and such event has not happened, or before the time fixed has expired, if it becomes certain that such event will not happen.—Sec. 35.

Examples :

- (i) *A* promises to pay *B* a sum of money if a certain ship return within a year. The contract may be enforced if the ship return within the year, and becomes void if the ship is burnt within the year.
- (ii) *A* promise to pay *B* a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

5. Impossible event : Contingent agreements to do or not to do anything, if an impossible event happens are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.—Sec. 36.

Examples :

- (i) *A* agrees to pay *B* Rs. 1,000 if two straight lines should enclose a space. The agreement is void.
- (ii) *A* agrees to pay *B* Rs. 1000 if *B* will marry *A*'s daughter *C*. *C* was dead at the time of the agreement. The agreement is void.

Difference between Contingent Contract and Wagering agreements

1. A contingent contract is valid, a wagering agreement is void.
2. A contingent contract depends on the happening or non-happening of an event; but the contract is valid, a wagering agreement is void.
3. Contingent contract may not contain reciprocal promises; a wagering agreement consists of reciprocal promise.
4. In a Contingent contract either party or both may have an interest in the subject matter of the contract; in a wagering agreement the parties have no interest except getting or paying money.
5. In a Contingent contract the future event is only collateral and valid; a wagering agreement is void.

EXERCISE

1. Explain the meaning of contingent contracts and their rules.

(Pages 95-98)

10 PERFORMANCE OF CONTRACTS

PERFORMANCE OR TENDER

Definition

A contract creates legal obligations. "Performance of a contract" means the carrying out of these obligations. Each party must perform or offer to perform the promise which he has made. Section 37, para 1, of the Contract Act lays down that, "The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this act, or of any other law."

The Offer to Perform or Tender

The offer to perform the contract is called Tender. Offer to perform or Tender may be called attempted performance. A tender, to be legally valid, must fulfil the following conditions.—Sec. 38 :

1. It must be *unconditional*. A tender coupled with a condition is no tender.

Example :

A passenger on a bus offers a rupee note for the fare which is 10p. only. It is not a valid tender because it imposes condition on the acceptance of the tender viz. the return of the balance out of the rupee. A tender of money must be of the exact sum due. *Bireswar v. The Emperor*.¹

2. A tender to pay *conditionally* upon the other party doing somethings such as giving a release or accepting the other amount in full satisfaction of all demands, is not a valid tender. But of course, a receipt may be demanded after a tender has been accepted.

3. A tender money, must be in legal tender money, not by any foreign money, or by promissory note or cheque. *Jagat v. Nabagopal*.²

¹ 46 C.W.N. 550

² 34 Cal. 305

4. The tender must be made at a *proper time and place*. What is proper time and place, depends upon the intention of the parties and the provisions of Sections 46-50 of the Act. (See pages 109-110).

A tender before the due date or at a time and place other than that agreed upon, is not a valid tender. *Eshaque v. Abdul Bari*.¹

5. The person to whom a tender is made must be given a *reasonable opportunity of ascertaining* that the person by whom it is made is able and willing there and then, to do *the whole of what he is bound by his promise to do*.

6. The reason behind the above rule is that an offer to perform a part of the promise is not a valid tender.

7. If the offer is an offer to deliver anything to the promisee, the promisee must have a *reasonable opportunity of seeing* that the thing offered is the thing which the promisor is bound by his promise to deliver.

Example :

P contracts to deliver to *B* at his warehouse on the 1st March 1973, 100 bales of cotton of a particular quality. *P* must bring the cotton to *B*'s warehouse, on the appointed day, under such circumstances that *B* may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

8. When there are several promisees, an offer to *any one of them* is a valid tender.

Effect of refusal to accept a properly made offer of performance or Tender

Where the promisor has made an offer of performance to the promisee, and the offer has not been accepted, the contract is deemed to be broken by the promisee and he can be sued for breach of contract.

Effect of refusal of party to perform promise wholly

When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified by words or conduct, his acquiescence in its continuance.—Sec. 39.

¹ 31 Cal. 183

Example :

P, a singer, enters into a contract with *B*, manager of a theatre to sing at his theatre two nights in every week during the next two months, and *B* engages to pay her at the rate of 100 rupees for each night. On the sixth night *P* wilfully absents herself. With the assent of *B*, *P* sings on the seventh night. *B* has signified his acquiescence in the continuance of the contract and cannot now put an end to it but is entitled to compensation for the damage sustained by him through *P*'s failure to sing on the sixth night.

BY WHOM IS A CONTRACT TO BE PERFORMED ?**1. Personal Performance**

In cases involving personal skill, taste, or credit, the promisor must himself perform the contract. The courts will enforce the intention of the parties, as expressed in the contract, or as may be inferred from the circumstances of the case.

2. Performance by representatives

In all other cases the promisor or his representatives may employ a competent person to perform it.—Sec. 40.

Examples :

- (i) *Q* promises to paint a picture for *B* ; *Q* must perform this promise personally.
- (ii) *Q* promises to pay *B* a sum of money. *Q* may perform this promise, either by personally paying the money to *B* or causing it to be paid to *B* by another.

3. Effect of Performance from a third person

When a promise accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.—Sec. 41.

4. Death of the Promisor

Contracts involving personal skill or volition, come to an end when the promisor dies. His heirs or legal representatives are not bound to perform such contracts. This rule is expressed in a Latin phrase, *actio personalis moritur cum persona*—a personal cause of action dies with the person concerned.

In cases not involving personal skill or volition, the legal representatives of a deceased promisor are bound to perform the contract. Upon failure to do so, they will be liable for breach

of contract. But the liability of the legal representatives is limited to the assets obtained from the deceased. They are not personally liable.

The legal representatives can enforce performance of the contract upon the other party or parties and their legal representatives.

Examples :

- (i) *P* promises to deliver goods to *B* on a certain day on payment of Rs. 1,000. *P* dies before that day. *P*'s representatives are bound to deliver the goods to *B*, and *B* is bound to pay Rs. 1,000 to *P*'s representatives.
- (ii) *Q* promises to paint picture for *B* by a certain day, at a certain price. *Q* dies before the day. The contract cannot be enforced either by *Q*'s representatives or by *B*.

5. Performance of Joint Promises — See below.

Who can demand performance ?

1. The promisee can demand performance of the promise. A stranger to a contract, i.e., one who is not a party to it, cannot file a suit to enforce it. A contract between *P* and *Q* cannot be enforced by *R*.

2. Under certain cases a stranger to the contract can enforce the contract. Examples, Trust, Assignee...etc. (See p. 44).

3. The legal representatives can enforce performance of the contract upon the other party or parties and their legal representatives.

DEVOLUTION OF JOINT RIGHTS AND LIABILITIES

Joint Performance

Two or more persons may enter into a joint agreement with one or more persons. *Example :* *A* and *B* jointly promise to pay Rs. 500 to *C* and *D*. In such cases, the question arises, who is liable to perform the contract and who can demand performance ? The rules on the subject are stated below—Sections 42-45 :

1. Devolution of Joint liabilities

When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such

persons must jointly fulfil the promise. Upon the death of one of the joint promisors, his liability devolves upon his legal representatives, and the legal representatives become liable to perform the contract jointly with the surviving parties. If all the parties die, the liability devolves upon their legal representatives jointly.—Sec. 42.

The English law on the point is different. In case of joint promises, the liability to perform, devolves in England, upon the surviving promisors. The legal representatives of deceased promisors are not liable.

2. Any one of joint promisor may be compelled to perform

“When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary compel any one or more of such joint promisors to perform the whole of the promise.”

Each promisor may compel contribution

“Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.”

Sharing of loss by default in contribution

“If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.”—Sec. 43.

[Sec. 43 does not apply to Sureties. See. ch. 13]

The English law is different. Under it “all joint contractors must be sued jointly for a breach of contract.” In India the promisee can choose against whom to proceed.

Examples :

- (i) *A, B & C* jointly promise to pay *D* Rs. 3,000. *D* may compel either *A* or *B* or *C* to pay him Rs. 3,000.
- (ii) *A, B & C* are under a joint promise to pay *D* Rs. 3,000. *C* is unable to pay anything and *A* is compelled to pay the whole. *A* is entitled to receive Rs. 1,500 from *B*.
- (iii) *A, B & C* jointly promise to pay *D* Rs. 3,000. *C* is compelled to pay the whole. *A* is insolvent but his assets are sufficient to pay one-half of his debts. *C* is entitled to receive Rs. 500 from *A*'s estate and Rs. 1,250 from *B*.

3. Effect of release of one joint promisor

“Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee not discharge the other joint promisors ; neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors.”—Sec. 44.

The English law on this point is different. Release of one joint promisor under English law releases all the promisors but not in India.

4. Devolution of joint rights

When a person has made a promise to several persons jointly, then (unless a contrary intention appears from the contract) the right to claim performance rests on all the promisees jointly so long as all of them are alive. When one of the promisees dies the right to claim performance rests with his legal representative jointly with the surviving promisees. When all the promisees are dead, the right to claim performance rests with their legal representatives jointly.—Sec. 45.

Example :

Q in consideration of Rs. 500 lent to him by *B & C*, promises *B & C* jointly to repay them the sum with interest on a day specified. *B* dies. The right to claim performance rests with *B*'s representative jointly with *C* during *C*'s life and after the death of *C* with the representatives of *B & C* jointly.

RECIPROCAL PROMISES

Definition

A Contract consists of reciprocal promises when one party makes a promise (to do or not to do something in the future) in consideration of a similar promise (to do or not to do something in the future) made by the other party. Such a contract is an exchange of promises.

Rules

Sections 51-54 and 57-58 of the Contract Act lay down the rules regarding the performance of reciprocal promises. They are stated below.

1. Promisor not bound to perform, unless reciprocal promisee ready and willing to perform

“When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.”—Sec. 51.

Examples :

- (i) *A & B contract that A shall deliver goods to B to be paid for by B on delivery. A need not deliver the goods, unless B is ready and willing to pay for the goods on delivery. B need not pay for the goods unless A is ready and willing to deliver them on payment.*
- (ii) *A & B contract that A shall deliver goods to B at a price to be paid by instalments, the first instalment to be paid on delivery. A need not deliver, unless B is ready and willing to pay the first instalment on delivery. B need not pay the first instalment, unless A is ready and willing to deliver the goods on payment of the first instalment.*

2. Order of performance of reciprocal promises

“Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order, and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.”—Sec. 52.

Examples :

- (i) *A & B contract that A shall build a house for B at a fixed price. A's promise to build the house must be performed before B's promise to pay for it.*
- (ii) *A & B contract that A shall make over his stock in trade to B at a fixed price, and B promises to give security for the payment of the money. A's promise need not be performed until the security is given, for the nature of the transaction requires that A should have security before he delivers up his stock.*

3. Liability of party preventing event on which contract is to take effect

“When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract.”—Sec. 53.

Example :

A & B contract that B shall execute certain work for A for a thousand rupees. B is ready and willing to execute the work accordingly but A prevents him from doing so. The contract is voidable at the options of A ; and, if he elects to rescind it, he is entitled to recover from A compensation for any loss which he has incurred by its non-performance.

4. Effect of default as to that promise which should be first performed, in-contract consisting of reciprocal promises

“When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by non-performance of the contract.”—Sec. 54.

Examples :

- (i) *A hires B's ship to take in and convey, from Calcutta to the Mauritius, a cargo to be provided by A, B receiving a certain freight for its conveyance. A does not provide any cargo for the ship. A cannot claim the performance of B's promise and must make compensation to B for the loss which B sustains by the non-performance of the contract.*
- (ii) *A contracts with B to execute certain builder's work for a fixed price, B supplying the scaffolding or timber, necessary for the work. B refuses to furnish any scaffolding or timber, and the work cannot be executed. A need not execute the work, and B is bound to make compensation to A for any loss caused to him by the non-performance of the contract.*
- (iii) *A contracts with B to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and B engages to pay for the merchandise within a week from the date of the contract. B does not pay within the week. A's promise to deliver need not be performed, and A must make compensation.*
- (iv) *A promises B to sell him one hundred bales of merchandise, to be delivered next day and B promises. A to pay for them within a month. A does not deliver according to his promise. B's promise to pay need not be performed, and A must make compensation.*

5. Reciprocal promises to do things legal and also other things illegal

“When persons reciprocally promise, firstly to do certain

things which are legal, and secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement.”—Sec. 57. (See. p. 92)

6. Agreement to do impossible act

An agreement to do an act impossible in itself is void.—Sec. 56. (See p. 92)

CONTRACTS WHICH NEED NOT BE PERFORMED

Sections 62 to 67 of the Contract Act are listed under the heading “Contracts which need not be performed”. The relevant provisions are as follows :

1. If by mutual agreement there is Novation, Rescission or Alteration, the original contract need not be performed. (Sec. 62. See Chapter 11)

2. The same rule applies in cases of Remission. (Sec. 63. See Chapter 11)

3. When a voidable contract is rescinded, the other party need not perform his promise. (Sec. 64. See “Restitution”, Chapter 11)

4. ‘If the promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.’ Sec. 67. (See under, “Breach of Contract”, Chapter 11)

II. Under the Law of Contract the following agreements need not be performed :

1. Unlawful consideration and object—Sec. 23 (See p. 77-83)

2. Where the performance is unlawful or illegal—Sec. 56 (See p. 92)

ASSIGNMENT OF CONTRACTS

Definition

Assignment means transfer. The rights and liabilities of a party to a contract can be assigned under certain circumstances. Assignment may occur (i) by act of parties or (ii) by operation of law.

Rules

The rules regarding assignment of contracts are summarised below :

1. Contracts involving personal skill, ability, credit, or other personal qualifications, cannot be assigned. *Examples* : a contract to marry ; a contract to paint a picture ; a contract of personal service ; etc.

2. The obligations under a contract, *i.e.*, the burden and the liabilities under the contract cannot be transferred. For example, if *X* owes *Y* Rs. 100 he cannot transfer the liability to *Z*, and force *Y* to collect his money from *Z*.

Exception—In both cases 1 and 2, the parties to a contract may agree to replace the original contract by a new one under which the obligations of one of the parties are shifted to a new party. Thus in the example given above if *Y* agrees to accept *Z* as his debtor in place of *X*, the liability to pay the debt is transferred from *X* to *Z*. Such cases are known as Novation.

3. A contract may be performed through the agency of a competent person, if the contract does not contemplate performance by the promisor personally.—Sec. 40. But in this case the original party remains responsible for the proper performance of the obligations under the contract.

4. The rights and benefits under a contract (not involving personal skill or volition) can be assigned. Thus if *X* is entitled to receive Rs. 500 from *Y*, he can assign his right to *Z* whereupon *Z* will become entitled to receive the money from *Y*. But in this case the assignment is subject to all equalities between the original parties. Thus if *Y* had already paid a portion of the debt to *X*, he will pay to *Z* correspondingly less.

5. The rights of a party under a contract may amount to an "actionable claim" or "a chose-in-action". Section 3 of the Transfer of Property Act defines an actionable claim as "a claim to any debt (except a secured debt) or to any beneficial interest...whether such claim or beneficial interest be existent, accruing, conditional or contingent." *Examples of actionable claims* : a money debt ; book debts ; the interest of a buyer of goods in a contract for forward delivery (*Jaffer Ali v. Budge Budge Jute Mills*¹) ; an option to repurchase property sold ; etc.

Actionable claims can be assigned but only by a written document. Notice must be given to the debtor.

6. Assignment by operation of law occurs in cases of death or insolvency. Upon the death of a party his rights and liabilities under a contract devolve upon his heirs and legal representatives (except in the case of contracts involving personal qualifications). In case of insolvency, the rights and liabilities of the person concerned pass to the Official Assignee or the Official Receiver.

THE TIME AND PLACE OF PERFORMANCE

General Rules

The time and the place of performance of a contract are matters to be determined by agreement between the parties to the contract. In sections 46 to 50 of the Indian Contract Act certain general rules have been laid down regarding the time and place of performance. They are as follows :

1. Time for performance without application

"Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time."

"*Explanation*—The question what is a reasonable time, is, in each particular case, a question of fact."—Sec. 46.

2. Time and place, where time is specified

"When a promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed."—Sec. 47.

Example :

D promises to deliver goods at *B*'s warehouse on the first January. On that day *D* brings the goods to *B*'s warehouse but after the usual hour for closing it and they are not received. *D* has not performed his promise.

3. Application for performance to be at proper time and place

"When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application

by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business."

*"Explanation—*The question 'what is a proper time and place' is, in each particular case, a question of fact."*—Sec. 48.*

4. To appoint a reasonable place for the performance

"When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place."*—Sec. 49.*

Example :

D undertakes to deliver a thousand maunds of jute to *B* on a fixed day. *D* must apply to *B* to appoint a reasonable place for the purchase of receiving it, and must deliver it to him at such place.

5. Manner and time prescribed or sanctioned by promisee

"The performance of any promise may be made in any manner or at any time which the promisee prescribes or sanctions."*—Sec. 50.*

Examples :

- (i) *B* owes *A* 2,000 rupees. *A* desires *B* to pay the amount to *A*'s account with *C*, a banker. *B*, who also banks with *C*, orders the amount to be transferred from his account to *A*'s credit and this is done by *C*. Afterwards and before *A* knows of the transfer, *C* fails. There has been a good payment by *B*.
- (ii) *A* and *B* are mutually indebted. *A* and *B* settle an account by setting off one item against another, and *B* pays *A* the balance found to be due from him upon such settlement. This amounts to a payment by *A* and *B* respectively of the sums which they owed to each other.
- (iii) *D* owes *B*, 2,000 rupees. *B* accepts some of *C*'s goods in deduction of the debt. The delivery of the goods operates as part payment.
- (iv) *Q* desires *B* who owes him Rs. 100, to send him a note for Rs. 100 by post. The debt is discharged as soon as *B* puts into the post a letter containing the note duly addressed to *Q*.

PERFORMANCE WITHIN STIPULATED TIME

Rules

Section 55 of the Contract Act lays down certain rules regarding the effects of failure to perform a contract within the stipulated time. They are as follows :

1. In contracts where time is of the essence of the contract, if there is failure to perform within the fixed time, the contract (or so much of it as remains unperformed) becomes voidable at the option of the promisee.

2. In such cases, the promisee may accept performance after the fixed time but if he does so he cannot claim compensation unless he gives notice of his intention to claim compensation at the time of accepting the delayed performance.

3. In contracts where time is not of the essence of the contract, failure to perform within the fixed time does not make the contract voidable, but the promisee is entitled to get compensation for any loss occasioned to him by such failure.

Case Law

When is time the essence of the contract? The decisions of the Supreme Court, regarding the 'time' of the performance of contracts, are summarised below :

1. The fixation of the period within which the contract has to be performed does not make the stipulation as to time the essence of the contract. *Gamathinayagam Pillai v. Palaniswami Nadar*.¹

2. The question whether or not time was of the essence of the contract would essentially be a question of the intention of the parties to be gathered from the terms of the contract. *Hind Constn. Contractors v. State of Maharashtra*.²

3. Even if a contract expressly lays emphasis on time as the essence of the contract, the condition will be dependent on other provisions of the contract. The inference that the work must be completed by a particular date may not be given the fundamental position because of the presence of such other provisions. If such other clauses provide for extension of time in certain probabilities or for payment of fine or penalty on daily or weekly basis if the work remains unfinished on the expiry of the given period, the express provision as regards the time being of the essence of contract will be rendered ineffective. *Hind Constn. Contractors v. State of Maharashtra*. (See above).

4. When a contract relates to sale of immovable property it will normally be presumed that the time is not the essence

¹ AIR (1967) Supreme Court 868

² AIR (1979) Supreme Court 720

of the contract. *Govind Prasad Chaturvedi v. Hari Dutt Shastri and another*.¹

5. In mercantile contracts, the time of delivery of goods is of the essence of the contract but not the time of the payment of the price. *Mahabir Prasad v. Durga Dutta*.²

RULES REGARDING APPROPRIATION OF PAYMENTS

When a debtor owes several distinct debts to the same creditor and makes a payment to the creditor, the question may arise against which debt the payment is to be appropriated. In England the law on the subject was laid down in *Clayton's case*.³ In India the rules regarding appropriation of payments are contained in Sections 59-61 of the Contract Act. The law on the point can be summarised as follows :

1. Express appropriation by Debtor

If the debtor at the time of making the payment expressly intimates that the payment is to be applied to the discharge of some particular debt, the payment if accepted, must be applied accordingly.

2. Implied appropriation by Debtor

If there is no express appropriation, but there are circumstances which imply that the debtor intended appropriation to a particular debt, the debtor's intention must be followed, if the money is accepted.

Examples :

- (i) *A* owes *B* among other debts, Rs. 1,000 upon a promissory note which falls due on 1st June. He owes no other debt of that amount. On the 1st June *A* pays to *B* 1,000 rupees. The payment is to be applied to the discharge of the promissory note.
- (ii) *A* owes to *B* among other debts, the sum of Rs. 567. *B* writes to *A* and demands the payment of this sum. *A* sends to *B* Rs. 567. This payment is to be applied to the discharge of the debt of which *B* had demanded payment.

3. Principal and Interest when both due

The general rule is that in absence of any appropriation by

¹ AIR (1977) Supreme Court 1005 ² AIR (1961) Supreme Court 990

³ (1816) 1 Mer 572, 610

the debtor at the time of payment, the payment should be attributed in the first instance to interest and then to the principal. *Harishchandra and another v. Kailashchandra and another*.¹

When both principal and interest are due, the debtor can stipulate that a particular payment made by him is to be appropriated to the principal, the interest remaining due. If the creditor accepts the payment he must also accept the debtor's appropriation. If he does not like to do so he must refuse to accept the payment.

4. Appropriation by Creditors

If there is no express or implied appropriation by the debtor, the creditor may apply the money to any lawful debt which is due and payable by the debtor. He may even apply it to a debt which is barred by the law of limitation.

Example :

S was an unregistered dentist who, according to the law in force in England, could not sue for performing a dental operation but could sue for materials supplied. S had a bill against P for £45 of which £20 was for performing an operation and £25 for materials supplied. P paid £20 without appropriating it. In an action by S, held (1) S could appropriate the £20 towards his professional services because it was a lawful debt although irrecoverable and (2) he could make the appropriation for the first time while giving evidence in his suit. *Seymour v. Pickett*.²

5. Order of appropriation

When neither the debtor nor the creditor makes any appropriation, the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law of limitation. If the debts are of equal standing (*i.e.*, of the same date) the payment shall be applied in discharge of each proportionately.

6. The rule in re Hallett's estate

Suppose that a man has an account in a bank in which he keeps his own money as well as some moneys of which he is a trustee. He makes a series of deposits and withdrawals, in the course of which some trust funds are misappropriated. In this

¹ AIR (1975) Raj. 15

² (1905) 1 K. B. 715

case, the withdrawals are to be debited first to his own moneys and then to the trust funds; and the deposits are to be credited first to the trust fund and next to his own fund, whatever be the order of withdrawals and deposits. *In re Hallett's Estate*.¹

EXERCISES

1. What do you understand by performance of a contract? Under what circumstances a contract need not be performed? (Pages 99, 107)
2. State the essentials of a valid tender. (Pages 99-100)
3. State the rules regarding appropriation of payments. (Pages 112-114)
4. When is time the essence of the contract? (Page 109)
5. Write notes on : (a) Devolution of joint promises (rights and liabilities); (b) Reciprocal promises; (c) Assignment of contracts. [Pages (a) 104-107; (b) 107-108; (c) 107-109]
6. Objective questions. Give short answers :
 - (i) *X* tenders a cheque for buying goods from *Y*. Is *Y* bound to accept the cheque? (Page 99)
 - (ii) *Q* promises to paint a picture for *B* by a certain day on payment of Rs. 1,000. *Q* dies before that day. Can this contract be enforced by *Q*'s representatives or by *B*? (Example (ii) page 102)

TERMINATION OR DISCHARGE OF CONTRACTS

METHODS OF TERMINATION

When the obligation created by a contract come to an end, the contract is said to be discharged or terminated. A contract may be discharged or terminated in any of the following ways :

- I. By performance of the promise or tender.
- II. By mutual consent cancelling the agreement or substituting a new agreement in place of the old.
- III. By subsequent impossibility of performance.
- IV. By operation of law—i.e., death, insolvency, or merger.
- V. By lapse of time.
- VI. By material alteration without the consent of the other parties.
- VII. By breach made by one party.

The rules regarding termination of contracts are discussed below.

I. TERMINATION BY PERFORMANCE

The obligations of a party to a contract come to an end when he performs his promise. Performance by all the parties, of the respective obligations, puts an end to the contract completely. This is the normal and natural mode of discharging a contract.

The *offer of performance* or tender has the same effect as performance. If a party to a contract offers to perform his promise but the offer is not accepted by the other party, the obligations of the first party are terminated.

II. TERMINATION BY MUTUAL AGREEMENT

By agreement of all parties, a contract may be cancelled or its terms altered or a new agreement substituted for it. Whenever any of these things happen, the old contract is terminated.

"If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."—Sec. 62.

Termination by mutual agreement may occur in any one of the following ways.

Novation

Novation occurs when a new contract is substituted for an existing contract, either between the same parties or between different parties. The definition was given by Lord Selborne in a House of Lords case, *Scarf v. Jardine*.¹ Anson however, is of opinion that novation can only take place by agreement between the parties. "Novation cannot be compulsory."²

It is now held that novation may occur by two ways, viz., (i) change of parties and (ii) a substitution of a new contract in place of the old.

Examples :

- (i) *A* is indebted to *B* and *B* to *C*. By mutual agreement *B*'s debt to *C* and *A*'s debt to *B* is cancelled and *C* accepts *A* as his debtor. There is novation.
- (ii) On an amalgamation of two companies into a new company, the creditors of the old companies can enforce their claims against the new company. The new company is substituted for the old companies.
- (iii) *A* owes *B* 1,000 rupees under a contract. *B* owes *C* 1,000 rupees. *B* orders *A* to credit *C* with 1,000 rupees in the books, but *C* does not assent to the arrangement. *B* still owes *C* 1,000 rupees, and no new contract has been entered into.
- (iv) *P* lent *D* Rs. 2,000. Afterwards the parties agreed that *D* will repay to *P* Rs. 1,000 and a certain amount of ornament at a certain date. The former agreement is replaced by the latter. There is novation.

Alteration

Alteration of a contract means change in one or more of the terms of a contract. Alteration is valid if it is done with the consent of all the parties to the contract.

In Alteration there is change in the terms of the contract but no change of the parties to it. In Novation there may be change of parties.

Remission

Remission may be defined as the acceptance of less than what was contracted for. According to Section 63 of Contract Act, "Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any

¹ (1882) 7 App. Cases 345

² Anson, *Law of Contract*, ch. XI

satisfaction which he thinks fit." So in India a promisee may remit or give up a part of his claim and a promise to do so is binding even though there is no consideration for doing so.

Examples :

- (i) *A* owes *B* Rs. 5,000. *A* pays to *B* and *B* accepts in full satisfaction for the whole debt. Rs. 2,000. The old debt is discharged.
- (ii) *A* promises to paint a picture for *B*. *B* afterwards forbids him to do so. *A* is no longer bound to perform the promise.
- (iii) *A* owes *B*, under a contract, a sum of money, the amount of which has not been ascertained. *A* without ascertaining the amount gives to *B*, and *B*, in satisfaction thereof, accepts the sum 2,000 rupees. This is a discharge of the whole debt whatever may be its amount.
- (iv) *H. K.* was liable to pay Rs. 27 lakhs. His estate was taken over by a committee to administer it. The committee offered to pay Rs. 20 lakhs to the creditor in full satisfaction and he accepted the offer. But afterwards the creditor sued the debtor for the balance viz., Rs. 7 lakhs. The Supreme Court held the case is covered by Sec. 63 and he is not entitled to sue. *Kapur Chand Godha v. Mir Nawab Himayat Ali Khan*.¹

Accord and Satisfaction

These two terms are used in English law. According to English law, a promise to accept less than what is due under an existing contract, is not supported by any consideration and is therefore unenforceable. But an exception is made where the smaller sum is actually paid (or the smaller obligation actually performed) and accepted by the promisee. In such cases the old contract is discharged by what is called *accord and satisfaction*. Accord means the promise to accept less than what is due under the old contract. Satisfaction means the payment or the fulfilment of the smaller obligation. An accord is unenforceable; but an accord followed by satisfaction discharges the pre-existing obligation.

Example :

P owes *Q* Rs. 5,000. *Q* agrees to accept Rs. 2,000 in full satisfaction of his claim. This promise is unenforceable in English law. But when Rs. 2,000 is actually paid and accepted, there is accord and satisfaction and the original debt is discharged.

The doctrine of accord and satisfaction is not applied in India. According to Section 63, a promise may dispense with or remit

¹ AIR (1963) Supreme Court 250

wholly or in part, the performance of the promise made to him. Therefore if the promise agrees to accept Rs. 2,000 in full satisfaction of a claim for Rs. 5,000 the promise is enforceable.

Rescission

Rescission means cancellation of all or some of the terms of a contract. The rescission of a contract may occur under various circumstances :

1. It may be done by mutual consent.—Sec. 62.
2. Where a party to a contract fails to perform his obligation, the other party can rescind the contract without prejudice to his rights to receive compensation for breach of contract.
3. In a voidable contract, one of the parties has the option of rescinding it.

Section 66 of the Indian Contract Act provides that, "The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal."

Rescission may be by act of party. It is not necessary, save in exceptional cases, to file a suit for the purpose.

Examples :

- (i) *P* promises to deliver certain goods to *Q* on a certain date. Before the date of performance *P* and *Q* mutually agree that the contract will not be performed. The parties have rescinded the contract.
- (ii) *X* was induced to enter into a agreement by coercion. He can rescind the agreement.

Suit for Rescission : Section 35 of Specific Relief Act (Act 1 of 1877) provides that, "Any person interested in a contract in writing may sue to have it rescinded." The court may grant rescission in the following cases :

- (a) When the contract is voidable or terminable by the plaintiff.
- (b) Where the contract is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff.
- (c) Where a decree for specific performance of a contract of sale, or of a contract to take a lease, has been made and the purchaser or the lessee makes default in payment of the purchase money or other sums which the court has ordered him to pay.

Waiver

Waiver means the abandonment of a right. A party to a

contract may waive his rights under the contract. Thereupon the other party is released from his obligations.

Merger

When a superior right and an inferior right coincide and meet in one and the same person, the inferior right vanishes into the superior right. This is known as merger.

Example :

A man holding property under a lease, buys the property. His rights as a lessee vanish. They are merged into the rights of ownership which he has now acquired.

III. SUBSEQUENT OR SUPERVENING IMPOSSIBILITY

Pre-contractual Impossibility

A contract which at the time it was entered into was impossible to perform, is void *ab initio* and creates no rights and obligations, e.g., a promise to ride a horse to the sun.

Post-contractual Impossibility

A contract, which at the time it was entered into, was capable of being performed may subsequently become impossible to perform or unlawful. In such cases the contract *becomes void*. This is known as the doctrine of *Supervening Impossibility*. It is also known as the Doctrine of Frustration. (See pages 124-126)

"A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."—Sec. 56, para 2.

Grounds of Frustration. Supervening impossibility may occur in many ways, some of which are explained below :

1. Destruction of an object

In the case *Taylor v. Caldwell*.¹ Blackburn J. observed as follows. "In contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance".

¹ (1863) 122 E. R. 299

Examples :

- (a) A music hall was let for a series of concerts on certain days. The hall was burnt down before the date of the first concert. The contract becomes void. *Taylor v. Caldwell*. (See p. 119)
- (b) A person contracted to deliver 200 tons of potatoes from a particular field. The potatoes were destroyed by a pest through no fault of the party. The contract was held to be discharged. *Howell v. Coupland*.¹
- (c) There was an agreement between the owner of a theatre and a producer, to exhibit a picture. The Municipal authorities issued order to demolish the theatre because it was unsafe. Neither of the parties knew that. Held, the contract was discharged. *V. L. Narasu v. P. S. V. Iyer*.²

2. Change of law

The performance of a contract may become unlawful by a subsequent change of law. In such cases, the original contract becomes void.

Examples :

- (i) *M* sold to *N* a specified parcel of wheat in a warehouse. Before delivery, the wheat was requisitioned by the Government under statutory powers. The delivery being now legally impossible, the contract was discharge. *Re Shipton, Anderson & Co*.³
- (ii) *X*, who was governed by Hindu Law and who already had a wife promises to marry *Y*. Then the Special Marriage Act is passed prohibiting polygamous marriage. The contract to marry becomes void.

3. Failure of Pre-conditions

When a contract is entered into on the basis of the continued existence of a certain state of things, the contract is discharged if the state of things changes.

This principle has been supported in some cases on the ground that every agreement presumes the existence of a certain state of things on the basis of which the agreement was entered into. The continued existence of the same state of things is a *condition precedent* to the performance of the contract. Obviously the contract fails if there is a failure of the condition precedent.

Examples :

- (i) *A & B* contract to marry each other. Before the time fixed for the marriage, *A* goes mad. The contract becomes void. [Illustration (b) of Section 56].

¹ (1876) 1 O. B. D. 258

² I. L. R. (1953) Mad. 831

³ (1915) 3 K. B. 676

- (ii) *H* hired a room from *K* for two days with the object (as both parties knew) of using the room to view the coronation procession of Edward VII although the contract contained no reference to the procession. Owing to the King's illness the procession was abandoned. Held, that the contract was discharged and *H* was excused from paying rent for the room as the existence of the procession was the basis of the agreement. *Krell v. Henry*.¹
- (iii) *A* contracts to take cargo for *B* at a foreign port. *A*'s Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared. [Illustration (d) of Section 56. See also para 5, below.]

4. Death or Incapacity for personal services

Where the personal qualification of a party is the basis of the contract the contract is discharged in cases of death or personal incapacity.

Examples :

- (i) *G* contracts to act at a theatre for six months in consideration of a sum paid in advance by *H*. On several occasions *G* is too ill to act. The contract to act on these occasions becomes void.
- (ii) A piano player was prevented from performing by a dangerous illness. Held, the contract is discharged because the player could have insisted on performing when she was unfit to do so. *Robinson v. Davison*.²
- (iii) A seaman was interned owing to war. His contract of service was discharged. *Herlock v. Beal*.³
- (iv) A music-hall artist was called up for army service. His contract of service was discharged. *Morgan v. Manser*.⁴

5. Outbreak of War

A contract entered into during war with an alien enemy is void *ad initio*. A contract entered into before the war commenced between citizens of countries subsequently at war, remains suspended during the pendency of the war. After the termination of the war, the contract revives and may be enforced.

The above rules regarding the effect of war on contracts were formulated by English judicial decisions and are applicable to India. But the following exceptions are to be noted :

- (i) In India there may be a valid contract with an enemy alien during war, if the Central Government specifically permits it.

¹ (1903) 2 K. B. 740

² (1871) L. R. 6 Ex. 269

³ (1916) 1 A.C. 486

⁴ (1948) 1 K. B. 184

- (ii) Contracts entered into before the outbreak of the war will be cancelled and not merely suspended, if they amount to aiding the enemy in the pursuit of war, *Eshosito v. Bowden*¹; or if they are of such a character that they cannot remain suspended e.g., when the contract involves the continuous performance of mutual duties.

Exceptions

Some illustrations are given below of cases which *do not* come within the principle of Supervening Impossibility.

1. *Difficulty of performance* : Difficulty does not excuse performance.

Examples :

- (i) *A* sold *B* a certain quantity of Finland timber to be delivered between July and September, 1914. No deliveries were made before August when war broke out and transport was disorganised so that *A* could not bring any timber from Finland. Held *B* was not concerned with the way in which *A* was going to get timber and therefore the impossibility of getting timber from Finland did not excuse performance. *Blackburn Bobbin Co. v. Allen & Sons*.²
- (ii) The appellants agreed to sell to the respondents a quantity of groundnuts to be shipped from Sudan to Hamburg during November or December, 1956. On November 2nd, the Suez Canal was closed and remained closed for the next five months. The appellants refused to perform the contract claiming that it had been frustrated by the closure of the canal. The House of Lords held there was no frustration, since it would still be possible to ship the nuts to Hamburg around the Cape of Good Hope. *Tsakiroglou & Co. Ltd. v. Noble Thorpe G. m. b. H.*³

2. *Commercial impossibility* : A wholesale dealer's contract to deliver goods is not discharged because a manufacturer has not produced the goods concerned. Similarly increase of wages or prices of raw materials, unseasonable weather or lack of adequate profits do not excuse performance. The reason is that if the parties did not stipulate to the contrary, they must have intended to take the risk of occurrences like these.

Example :

In July 1946, the appellants entered into a contract with the respondents to build 78 houses for a fixed sum £ 94,424. Owing

¹ (1857) 7 E & B 783

³ (1962) A.C. 93

² (1918) 2 K. B. 467

to an unexpected shortage of skilled labour and of certain materials the contract took twenty-two months to complete instead of the eight months expected, and cost sum £1,15,000. The appellants contended that the contract had been frustrated and that they were entitled to claim on a quantum meruit for the cost actually incurred. The House of Lords held that the performance of the contract was more onerous but did not discharge the agreement. The situation was still within the scope of the contract. *Davis Contractors Ltd. v. Fareham U.D.C.*¹

3. *Strikes, lock-outs, civil disturbances and riots* : These events do not terminate contracts unless there is a clause in the contract providing that in such cases the contract is not to be performed or that the time of performance is to be extended.

Examples :

- (i) The lessee of certain salt pans, failed to repair them according to the terms of his contract, on the ground of a strike of the workmen. Held, a strike of workmen is not sufficient reason to excuse performance of a term of the contract. *Hari Laxman v. Secretary of State for India*.²
- (ii) A contract was entered into between two London merchants for the sale of certain Algerian goods. Owing to riots and civil disturbances in that country, the goods could not be brought. Held, no excuse for non-performance of the contract. *Jacob v. Credit Lyonnais*.³

4. *Failure of one of the objects* : When there are several purposes for which a contract is entered into, failure of one of the objects does not terminate the contract.

Example :

X agreed to let out a boat to Y for the purpose of viewing a naval review to be held on the occasion of the Coronation of Edward VII and to cruise round the fleet. Owing to the king's illness the naval review was abandoned but the fleet was assembled and the boat could have been used to cruise round the fleet. Held the contract was not terminated. *Herne Bay Steamboat Co. v. Hutton*.⁴

The Effects of Supervening Impossibility

1. Section 56 (para 2) provides that when the performance of a contract becomes subsequently impossible or illegal, the contract becomes void.

2. Section 65 provides that when a contract becomes void, any person who has received any advantage under it must restore

¹ (1956) A. C. 696

² (1928) 30 Bom. L. R. 49

³ 12 Q. B. D. 589

⁴ (1903) K. B. 740

it, or make compensation for it, to the person from whom he received it. [See under Restitution, p. 140]

3. Section 56 (para 3) provides that, "where one person has promised to do something which he knew, or with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."

Example :

P contracts to marry *B* being already married to *C*, and being forbidden by the law to which he is subject to practice polygamy. *P* must make compensation to *B* for any loss caused to her by the non-performance of his promise.

THE DOCTRINE OF FRUSTRATION

Definition

When the common object of a contract can no longer be carried out, the court may declare the contract to be at an end. This is known as the Doctrine of Frustration. Anson says, "Most legal systems make provision for the discharge of a contract where, subsequent to its formation, a change of circumstances renders the contract legally or physically impossible of performance."

The law relating to this subject, as in England and India respectively, is stated below.

English Law

Before 1863 a contract, excepting an illegal agreement, was enforced literally. All the parties of a contract had an absolute obligation to perform it. The Doctrine of Frustration emerged after 1863 through court decisions.

In a very old case, decided in 1647, the facts were as follows ; A person *J* got a lease of land from *P* on a rental basis. Then a German Prince seized the land and it was not possible for *J* to use it. The landlord *P* sued for rent. The Court held that *J* must carry out all the terms on the contract including the payment of rent. *Paradine v. Jane*.¹ This case illustrated the rigours of English Law.

¹ (1647) Aleyn 26

Later on many exceptions to the Doctrine of Frustrations were made and on various grounds the court gave relief to aggrieved persons. In the following cases English courts accepted that the contract came into an end : (1) Destruction of an object (2) Change of Law (3) Failure of Pre-conditions (4) Death or Personal Incapacity and (5) Outbreak of War. The cases on those subjects have been cited above. (Pages 119-121)

Basis of the Doctrine : In English courts various theories have been put forward at different times as to the basis of discharge of contracts by Frustrations.¹ The theories are summarised briefly.

(1) *The implied terms* : In some cases it has been held that every contract contained an implied term that a particular thing or state of things should continue to exist. The continued existence of the same state of things is a condition precedent to performance of the contract. Example : *Krell v. Henry*. (See p. 121)

(2) *Disappearance of the foundation of the contract* : If the goods which are the subject of the contract are destroyed without any fault of the parties, the contract should terminate. *Taylor v. Caldwell*. (See p. 119)

(3) *The just and reasonable solution* : In *British Movietonews Ltd. v. London and District Cinemas Ltd.*,² the House of Lords based the doctrine upon the principles of construction or interpretation of documents. Where the court gathers as a matter of construction that the contract itself contained impliedly or expressly a term, according to which it would stand discharged on the happening of certain circumstances, the dissolution of the contract would take place under the terms of the contract itself.

(4) *Change in the obligation* : "Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract." Per Lord Radcliffe. *Davis Contractors, Ltd. v. Fareham U. D. C.* (See p. 123)

Limits : In English law there are certain limits of the Doctrine of Frustration.

(a) If the frustration is self-induced by the party (e.g. negligent acts) the contract is not frustrated.

¹ Anson, *Law of Contract*, p. 464

² (1952) A. C. 166

(b) The frustrating event should defeat the common intention of the parties. There cannot be frustration on one side only.

Example :

Blackburn Bobbin Co. v. Allen and Sons. (See. p. 122)

Effects : In English law frustration produces the following effects : (a) The contract terminates automatically and immediately. It is void and not voidable only. (b) All future obligations are discharged. (c) Some reliefs have been given in England by the Law Reform (Frustrated Contracts) Act 1943.

Example :

Some English merchants contracted to sell machinery to Polish buyers. Before delivery was due, Germany occupied Poland. It was held that the contract was discharged by frustration. *Fibrosa etc. v. Fairbairn etc.*¹

Indian Law

In *Satyabrata Ghosh v. Mugniram Bangur and Co. and Another*,² the Supreme Court of India discussed the English cases relating to frustration and came to the following conclusions :

The doctrine of frustration of contract comes into play when a contract becomes impossible of performance, after it is made, on account of circumstances beyond the control of the parties. It comes within the purview of Sec. 56 of the Indian Contract Act. The word 'impossible' in this section has not been used in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view ; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can be said that the promisor finds it impossible to do the act which he promised, to do. (See section 56, pp. 119-120)

Examples :

- (i) An agreement was entered into for the sale of land subject to the condition that the seller would do some development work on the land. Before the work could be completed the land was requisitioned by the Government for war purposes. Held, the contract was *not* frustrated. *Satyabrata Ghose v. Mugniram Bangur & Co. and Another.* (See above).

¹ (1943) A.C. 32

² (1954) S. C. A. 187 (Supreme Court)

- (ii) There was a contract for sale of goods relating to the Nizam's Jewellery Trust on taking delivery of goods upon payment. Meanwhile the courts restrained the sale by an injunction. The contract of sale must be deemed to be frustrated. *M/s Shanti Vijay & Co. etc. v. Princess Fatima Fouzia and others.*¹

IV. TERMINATION BY OPERATION OF LAW

A contract terminates by operation of law in case of death, insolvency, and merger.

Death—In contracts involving personal skill or ability, death terminates the contract. In other cases, the rights and liabilities pass on to the legal representatives of the dead man.

Insolvency—Upon insolvency, the rights and liabilities of the insolvent are, with certain exceptions, transferred to an officer of the court, known as the Official Assignee in Calcutta and other presidency towns and as Official Receiver in other areas.

Merger—See p. 119.

V. LAPSE OF TIME

Contracts may be terminated by lapse of time. In civil suits the obligations and liabilities in contracts are barred by limitation. The provisions of law are stated in the Limitation Acts.

VI. TERMINATION BY MATERIAL ALTERATION

If the document containing the terms of a contract is *materially altered* by a party to the contract, *without the consent* of the other parties, the contract is discharged and cannot be enforced any more.

The term 'material alteration' means a change which affects or alters, in a significant manner, the rights and liabilities of the parties.²

Example :

A change in the amount of money to be paid ; the time of payments ; the place of payment ; the names of the parties etc.

These changes involve tampering with the document wherein the terms of the contract have been written down. A document which has been tampered with in such a way is not admissible

¹ AIR (1980) Supreme Court 17

² Halsbury's Laws of England (Fourth Edition). para 1378

in evidence and the contract recorded there naturally becomes unenforceable.

If an alteration (by erasure, interlineation, or otherwise) is made in a material part of a deed, after its execution, without the consent of the party or parties liable under it, the deed is rendered void from the time of the alteration. *Loonkaran Sethia etc. v. Mr. Ivan E. John & others etc.*¹

An alteration which does not affect the rights and liabilities of the parties or which are made to carry out the common intention of the parties has no effect on the validity of the contract.

Example :

Correcting a clerical error in figures, correcting the spelling of a name etc. (See under, 'Law relating to Negotiable Instruments'. Ch. 3).

VII. TERMINATION BY BREACH OF CONTRACT

When a contract is broken by one party, the other party or parties are freed from the obligation of performing the contract. They can also take the remedial measures to which they are entitled.

Breach of contract may arise in two ways : (i) by anticipatory breach and (ii) by actual breach or present breach.

Anticipatory Breach of Contract

Anticipatory breach of contract occurs when a party repudiates his liability under the contract *before the time for performance is due* or when a party by his own act *disables himself* from performing the contract.

Examples :

- (i) *C* enters into a contract to supply *B* with certain articles on the 1st of June. Before 1st June he informs *B* that he will not be able to supply the goods.
- (ii) *W* agrees to sing at *L*'s theatre on and from a certain date. Before that date she enters into a long term contract to sing at a different theatre.
- (iii) *X* agrees to marry *Y*. Before the agreed date of marriage, he marries *Z*.

¹ AIR (1977) Supreme Court 336

Consequences of Anticipatory Breach

When anticipatory breach occurs, the aggrieved party can take the following steps :

- (i) He can treat the contract as discharged, so that he is no longer bound by any obligations under the contract ; and,
- (ii) He can immediately adopt the legal remedies available to him for breach of contract, viz., file a suit for damages or specific performance or injunction.

Anticipatory breach of contract does not by itself discharge the contract. The contract is discharged only when the aggrieved party chooses to treat it as discharged, i.e., when he accepts the repudiation of the contract. If he does not accept the repudiation the contract continues to exist and may be performed by the other party, if possible. But if the repudiation is not accepted and subsequently an event happens which discharges the contract legally (e.g., a supervening impossibility) the aggrieved party loses his right to sue for damages.

Examples :

- (i) *D* agrees to employ *H* as a courier, the service to commence from 1st June. On 1st May he informs *H* that his services will not be required. On 11th May *H* files a suit for damages. He is entitled to do so even though the date of performance of the contract has not arrived. *Hochster v. De la Tour*.¹
- (ii) *X* agreed to load a cargo of wheat on *R*'s ship at Odessa within a certain number of days. When the ship arrived *R* refused to load the cargo. *Y* did not accept the refusal and continued to demand a cargo. Before the last date of loading had expired the Crimean War broke out, rendering the performance of the contract illegal. Held, the contract was discharged and *Y* cannot sue for damages. *Avery v. Bowden*.²
- (iii) The defendant promised to marry the plaintiff upon his father's death ; but during his father's life time he renounced the contract. Held, the plaintiff was entitled to sue without waiting the father's death. *Frost v. Knight*.³

Actual Breach of Contract

Actual breach of contract occurs when during the performance of the contract or at the time when the performance of the contract is due, one party either fails or refuses to perform his obligations under the contract.

The refusal of performance may be *express* (i.e., by word

¹ (1853) 2 E & B 678

² (1856) 5 E & B 714

³ (1872) L. R. 7 Ex. 111

or by writing) or *implied* (i.e., by conduct of the party or by non-action) or abstaining from doing something.

Examples :

- (i) *D* agrees to deliver to *B*, 5 tons of sugar on 1st June. He fails to do so on 1st June. There is breach of contract by *D*.
- (ii) *P* agrees to deliver to *Q* 5 tons of sugar on 1st June. On 1st June he tenders the sugar but *Q* (for no valid reason) refuses to accept delivery. There is breach by *Q*.
- (iii) *C* agreed to supply a railway company with 3,900 tons of railway chairs. After 1787 tons had been delivered the company told *C* that no more will be required. There is breach of contract by the company. *Cort v. Ambergate Railway Company*.¹

Remedies of Breach of Contract

When a breach of contract occurs, the aggrieved party or the injured party becomes entitled to the following reliefs :

1. *Rescission of the contract* : The aggrieved party is freed from all his obligations under the contract. (See p. 118)

Examples :

- (i) *C* promises to deliver 5 tons of sugar to *B* on a certain date and *B* promises to pay the price on receipt of the goods. *C* does not deliver the goods on the appointed day. *B* need not pay the price.
- (ii) *A* contracts with *B* to repair *B*'s house. *B* neglects or refuses to point out to *A* the place, in which his house requires repair. *A* is excused for the non-performance of the contract if it is caused by such neglect or refusal. (Illustration of Sec. 67)

2. *Suit for Damages* : The aggrieved party is entitled to receive compensation for any loss or damage caused to him by the breach of contract and can file a suit for getting a decree for damages.

3. *Suit upon Quantum Meruit* : When a contract has been partly performed the aggrieved party can, under certain circumstances, file a suit for the price of the services performed before breach of contract.

4. *Specific performance of the contract* : In certain special cases the court can direct a party to perform the contract according to the agreed terms.

5. *Injunction* : Under certain circumstances the court can issue an order upon a party whereby he is prohibited from doing something which amounts to a breach to contract.

The provisions of law regarding the reliefs listed above are discussed below.

¹ (1851) 17 Q. B. 127

DAMAGES

When a contract is broken the injured party can claim damages from the other party. Damages allowed by the courts may be of different types as follows :

Compensatory Damages

Compensatory damages are damages calculated in such a way as to compensate or make up the loss suffered by a party. They can also be called Ordinary Damages.

Special Damages — See page 133.

Nominal Damages, Contemptuous Damages

Where the court finds that the party has not actually suffered much damage or when the court is of opinion that the breach complained of was too insignificant or petty ; the court allows a paltry sum for damages to the plaintiff. These are called nominal damages or contemptuous damages.

Exemplary, Punitive or Vindictive Damages

The court may allow damages exceeding the actual loss suffered by way of punishment. These are called exemplary, punitive or vindictive damages. Such damages are unusual. In English courts exemplary damages are usually given in cases of breach of contract of marriage and against bankers refusing to pay traders' cheques where there are sufficient funds of the trader in the bank. *Addis v. Gramophone and Co.*¹

Example :

A scurrilous libel was committed by an author and its publisher against a distinguished naval officer. The officer sued for damages in an English Court. He was awarded £15,000—compensatory and £25,000/-exemplary damages, against both defendants. The Court of Appeal (presided by Lord Denning) did not interfere with the decision of the trial court. *Broome v. Cassell and Co.*²

RULES REGARDING THE AMOUNT OF DAMAGES

The principles

The principles, to be followed by the courts in determining the amount of damages, are laid down in Sections 73 to 75 of the Contract Act.

¹ (1909) A. C. 488

² (1971) 2 All E. R. 187

Section 73 (para 1) provides that in cases of breach of contract the injured party is entitled to receive compensation for any loss or damage which arose naturally from the breach or which the parties knew to be likely to arise from the breach.

"When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it."—Sec. 73, para 1.

Rules

The rules on the subject of amount of damages can be summarised as follows :

1. Actual loss

Ordinarily, the aggrieved party is entitled to recovery by way of compensation, only the *actual loss* suffered by him.

2. Natural and usual loss

In calculating actual loss, the court will take into account only such loss as may be *fairly and reasonably* considered as arising *naturally* and in the *usual course of things* from the breach. Remote damages *i.e.*, damages for remote consequences are usually not allowed.

Examples

- (i) *X*, a carrier, was entrusted with the delivery of a machine part (breakage of a crankshaft) to *Y*, a manufacturer. The delivery was delayed. *Y* claimed from *X* compensation for the wages of workers and depreciation charges which were incurred during the period the factory was idle for the delayed delivery and for loss of profits which might have been made if the factory was working. The first two items were allowed because they were natural consequences of the breach. The last item, loss of profits was disallowed because it was a remote consequence. *Hadley v. Baxendale*.¹
- (ii) *A* contracts to sell and deliver 50 maunds of saltpetre to *B*, at a certain price to be paid on delivery. *A* breaks his promise. *B* is entitled to receive from *A* by way of compensation the sum if any by which the contract price falls short of the price for which *B* might have obtained 50 maunds of saltpetre of like quality at the

¹(1854) 9 Ex. 341

time when the saltpetre ought to have been delivered. [Illustration (a) to Sec. 73]

- (iii) *A* contracts to pay a sum of money to *B* in a day specified. *A* does not pay the money on that day. *B* in consequence of not receiving the money on that day is unable to pay his debts and is totally ruined. *A* is not liable to make good to *B* anything except the principal sum he contracted to pay, together with interest upto the day of payment. [Illustration (n) to Sec. 73]
- (iv) *A* hires *B*'s ship to go to Bombay, and there take on board, on the first of January a cargo which *A* is to provide, and to bring it to Calcutta, the freight to be paid when earned. *B*'s ship does not go to Bombay but *A* has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. *A* avails himself of those opportunities, but is put to trouble and expense in doing so. *A* is entitled to receive compensation from *B* in respect to the trouble and expense. [Illustration (b) to Sec. 73]

3. Special damages

The court may allow remote damages *i.e.*, damages not arising naturally from the breach, if such damages may reasonably be supposed to have been in the contemplation of both the parties at the time they made the contract.

Damages coming within this category are sometimes called, "Special Damages".

Examples :

- (i) *A* delivers to *B*, a common carrier, a machine to be conveyed without delay to *A*'s mill *informing B that his mill is stopped for want of the machine*. *B* unreasonably delays the delivery of the machine and *A*, in consequence, loses a profitable contract with the government. *A* is entitled to receive from *B*, by way of compensation, the average amount of profits which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the government contract. [Illustration (i) to Sec. 73]
- (ii) *P* bought from *L* some copra cake. *P* sold the cake to *B*, who sold it to various dealers who in turn sold it to farmers, who used it for feeding cattle. The copra cake was poisonous and the cattle fed on it died. The various buyers filed suits against their sellers and obtained damages. The various sellers filed suits against *P* and obtained damages. *P* claimed from *L* the damages and costs he had to pay. Held, as it was within the contemplation of the parties that the copra cake was to be used for feeding cattle. *L* was liable to pay damages. *Pinnock Bros. v. Lewis & Peat Ltd.*¹

¹ (1923) 1 K. B. 690

4. Restitution and Compensation

The general rule is that, subject to the rules stated above, the injured party is to be placed in the same financial position as he would have been in, if the other party had duly carried out the contract. "If a contract is broken, law will endeavor, so far as money can do it, to place the injured party in the same position as if the contract has been performed."

It follows that damages are given for restitution and compensation. Damages are not given with the object of punishment, except in certain special cases, e.g., breach of contract of marriage.

Generally, in Sale Contracts, damages are given on the basis of the differences between the contract price and the market price.

See example (iii), page 106.

5. Costs

The injured party is entitled to get the costs of getting the decree for damages.

6. Minimisation of loss

It is the duty of the injured party to minimise the loss as much as possible. The law imposes on the plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damages which is due to his neglect to take such steps. *Jamal v. Moola Dawood Sons & Co.*¹

Example :

The plaintiff took a shop on lease and paid an advance. The defendant could not give him possession and the plaintiff chose to do no business for 8 months though there were other shops available in the vicinity. Held, he was entitled only to refund of his advance as his duty was to minimise damages and he could have done so by taking another shop. *Neki v. Pirbhu.*²

7. Effect of a penalty clause

If in a contract a sum of money is named as the amount to be paid in case of breach, or if the contract contains any stipulation by way of penalty for failure to perform the

¹ (1916) 43 I. A. 6

² 100 I. C. 662

obligations, the court will allow *reasonable compensation, not exceeding the sum named*.—Sec. 74.

Example :

A contracts with *B* to pay *B* Rs. 1000 if he fails to pay *B* Rs. 500 on a certain day. *A* fails to pay *B* Rs. 500 on that day. *B* is entitled to recover from *A* such compensation, not exceeding Rs. 1000, as the court considers reasonable.

8. Difficulty of assessment

Difficulty of calculating damages is no ground for refusing damages. The court must make an assessment of loss and pass a decree for it.

Example :

H organised a beauty competition in which 50 ladies were to be selected by votes of the readers of certain newspapers. *H* would select 12 out of the 50 and secure theatrical jobs for them. *C* was one of the 50 and by *H*'s breach of contract was prevented from being present when the final selection was made. Held, *C* was entitled to damages even though it was difficult to calculate them. *Chaplin v. Hicks*.¹

Liquidated Damages and Penalty

A contract sometimes contains a clause in which a sum of money is named as the amount payable in case of breach of contract. In such cases the question arises whether the courts of law will accept this figure as the measure of damage.

English Law : According to English law, the amount of money payable is interpreted either as liquidated damages or as a penalty. It is considered to be liquidated damages when the amount is fixed by the parties on the basis of a *reasonable* estimate of the *probable* actual loss which a party will suffer in case of breach. On the other hand, the amount fixed is considered to be a penalty if it is *not* based upon a reasonable calculation of actual loss but is fixed by way of *punishment* and as a *threat*. Suppose that a contractor agrees to complete the building of a house by 1st June and promises to pay Rs. 50 per day as damages for each day of default beyond the prescribed day of completion. If the figure Rs. 50 was arrived at after calculating the actual loss which the house-owner will suffer for the breach of contract, it is liquidated damages. If the actual

¹ (1911) 2 K. B. 786

damage is considerably less and the amount was fixed in order to threaten the contractor it is a penalty.

In case of liquidated damages, English courts allow only the amount stipulated, never more or less even though it is shown that the actual loss is different from the amount mentioned. Penalty clauses, however, are treated as invalid. The court allows only reasonable compensation by way of damages.

Indian Law : In India, the distinction between liquidated damages and penalty is not recognised. Section 74 of the Contract Act lays down that if the parties have fixed what the damages will be, the courts will never allow more. But the court may allow less. A decree is to be passed only for reasonable compensation, not exceeding the sum named by the parties.

Exception : There is one exceptional case provided for by Section 74. When any person enters into any bail bond or similar instrument or gives any bond (to the Central Government or any State Government) for the performance of any public duty, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein. In this case it is not necessary to calculate the actual loss.

Examples :

- (i) *A* contracts with *B* to pay *B* Rs. 1000 if he fails to pay *B* Rs. 500 on a given day. *A* fails to pay *B* Rs. 500 on that day. *B* is entitled to recover from *A* such compensation, not exceeding Rs. 1,000, as the Court considers reasonable. [Illustration 'a' in Section 74]
- (ii) *A* borrows Rs. 100 from *B* and gives him a bond for Rs. 200 payable by five yearly instalments of Rs. 40, with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty. [Illustration 'g' in Section 74]
- (iii) The appellants, sold tyres and tubes, to the respondents who contracted not to resell them, at a price below the manufacturers' list prices. The respondents further agreed to pay £5 by way of liquidated damages for every breach of this agreement. They sold a tyre at less than the list price. The House of Lords held that the sum fixed was a pre-estimate of the damage and not a penalty. *Dunlop Pneumatic Tyre Co. Ltd v. New Garage and Motor Co. Ltd.*¹
- (iv) The defendant agreed not to sell any one of the plaintiffs' cars below the listed price. For every breach he was to pay £250, as 'agreed damages'. The Court of Appeal of England held that this was a penalty. *Ford Motor Co. v. Armstrong*.²

¹ (1915) A. C 79

² (1915) 31 T. L. R. 267

Can increased interest be called as penalty ?

A stipulation that increased interest will be paid from the date of default of performance may be considered a penalty clause and disallowed by the courts. If simple interest is payable and there is a condition in the agreement that the debtor will have to pay compound interest on failure to pay at the specified date, the condition will be considered penalty.

When can interest be claimed ?

Interest can be claimed and awarded for any debt or damages. The rules regarding interest were formerly laid down in the Interest Act of 1839. This Act was repealed in 1978 and was replaced by the Interest Act of 1978 (Act No. 14 of 1978). The important rules of the Act of 1978, regarding interest for debt and damages, are stated below : (1) there must be a debt or a sum certain ; (2) it must be payable at a certain time or otherwise ; (3) these debts or sums must be payable by virtue of some written contract at a certain time ; (4) there must have been a demand in writing stating that interest will be demanded from the date of demand ; and (5) the rate of interest must not exceed the current rate of interest. The phrase "the current rate of interest" means the highest of the maximum rates at which interest may be paid on different classes of deposits given or issued by the rules of the Reserve Bank of India.

The rules, stated above, do not apply to any debt or damages on which (a) interest is payable as of right; by virtue of any agreement ; and (b) when such payment of interest is barred by virtue of an express agreement. The rules do not apply to (a) compensation for dishonour under the Negotiable Instruments Act ; and (b) rules under the Code of Civil Procedure. The Court can award interest upon interest.

QUANTUM MERUIT

Definition

The phrase "Quantum Meruit" means "as much is merited". A person can, under certain circumstances, claim payment for work done or goods supplied without any contract and in cases where the original contract has terminated by breach of contract by one party or has become void for some reason. This is known as the Doctrine of Quantum Meruit.

Rules

The rules regarding the Doctrine of Quantum Meruit are stated below.

1. Where there is a breach of contract, the injured party is entitled to claim reasonable compensation for what he has done under the contract.

Examples :

- (i) *P* agreed to write a book to be published by instalments in a magazine owned by *C*. After a few instalments were published, the magazine was abandoned. *P* is entitled to get damages for breach of contract and payment quantum meruit for the part already published. *Planche v. Colburn*.¹
- (ii) The plaintiff agreed to erect certain building but failed to complete the contract. The defendant completed the building himself, using the materials left on the site by the plaintiff. It was held that the plaintiff could not recover for the work done, but he was entitled to recover the value of the materials used. *Sumpter v. Hedges*.²

2. When a contract is discovered to be unenforceable for some technical reason, any person who had done something under the contract, is entitled to reasonable compensation. The case is proved for by Section 65 of the Act. (See p. 140)

Example :

C was employed as managing director of a company by the board of directors of the company under a written contract. The contract was found to be void because the directors who constituted the board were unqualified. *C* actually worked as managing director for some time. It was held that he was entitled to remuneration as quantum meruit. *Craven-Ellis v. Canons Ltd.*³

3. In certain cases the law presumes an implied agreement to pay for services rendered, for example, when work is done or goods are supplied by a person without any intention to do so gratuitously and the benefit of the same enjoyed by the other party. This case is provided for by Section 70 of the Contract Act. (See p. 142)

Example :

A, a trader leaves certain goods with *B* by mistake, not intending to do so gratuitously. *B* uses the goods. He must pay for them.

4. Where a contract is not divisible into parts and a lump sum of money is promised to be paid for the entire work, part

¹ (1831) 8 Bing 14

² (1898) 1 Q. B. 673

³ (1936) 2 K. B. 403

performance does not entitle a party to claim payment quantum meruit.

Example :

A sailor was appointed on a ship for a voyage from Jamaica to Liverpool on a lump sum payment of 30 guineas. He died when only two-thirds of the voyage was completed. Held, his legal representatives could not recover anything. *Curter v. Powell*.¹

5. Nothing can be recovered for quantum meruit when there is no evidence of an excess or implied promise to pay for work already done.

6. A person guilty of breach of contract cannot claim payment on quantum meruit.

⑧ SPECIFIC PERFORMANCE

Under certain circumstances, a person aggrieved by breach of contract can file a suit for specific performance, *i.e.*, for an order by the court upon the party guilty of breach of contract directing him to perform what he promised to do. Specific performance is a discretionary remedy which is allowed only in a limited number of cases. Rules regarding the granting of this relief are contained in the Specific Relief Act of 1877.

Generally speaking specific performance is directed only in cases where monetary compensation is not an adequate remedy. For example, in contract for the sale of a particular house or some rare article, monetary compensation is not enough because the injured party will not be able to get an exact substitute in the market. In such cases specific performance may be directed.

Specific performance is not allowed in cases where monetary compensation is an adequate relief. It is also not allowed in contracts of a personal nature, *e.g.*, a contract to marry or a contract to paint a picture. Where it is not possible for the court to supervise the performance of the contract, *e.g.*, a building contract, specific performance is not granted.

INJUNCTION

Injunction means an order of the court. In cases of breach of contract, the injured party can, under certain circumstances,

¹ 101 E. R. 573

get a negative injunction, *i.e.*, an order prohibiting a party from doing something. Injunctions are usually granted to enforce negative stipulations in cases where damages are not adequate relief. It is particularly appropriate in cases of anticipatory breach of contract.

Examples :

- (i) *G* agreed to buy the whole of the electric energy required for his house from a certain company. This was interpreted as a promise not to buy electricity from any other company. He was therefore restrained by an injunction from buying electricity from any other company. *Metropolitan Electric Supply Company v. Ginder*.¹
- (ii) *N*, a film actress agreed to act exclusively for Warner Bros. for one year. During the year she contracted to act for *X*. Held, she could be restrained by an injunction from acting for *X*. *Warner Bros. v. Nelson*.² It is to be noted that in this case an order directing *N* to act for Warner Bros. (specific performance of the contract) was not passed because the contract was of a personal nature and performance could not have been supervised by the courts.

RESTITUTION OF BENEFIT

Section 64 of the Contract Act provides that when a person, at whose option a contract is voidable, rescinds such contract, he must restore to the other party any benefit which he may have received from him. For example, when a contract for the sale of a house is avoided on the ground of undue influence, any money received on account of the price must be refunded.

Section 65 provides that when an agreement is *discovered to be void* or when a contract *becomes void*, any person who has received any advantage under such agreement or contract is bound to restore it or to make compensation for it, to the person from whom he received it.

This section applies to contracts 'discovered to be void' and contracts which 'becomes void'. It does not apply to contracts which are known to be void. Thus if *A* pays Rs. 100 to *B* to beat *C*, the money is not recoverable.

The expression 'become void' is interpreted liberally. In *Muralidhar Chatterjee v. The International Film Co.*¹ it was held that when one party rescinds a contract for the default of another he is entitled to damages (if he has suffered any) but he must

¹ (1901) 2 Ch. 799

² (1937) 1 K.B. 209

restore to the other party any advantage he has received under the contract.

Examples :

- (a) *A* pays *B* Rs. 1000 in consideration of *B*'s promising to marry *C*, *A*'s daughter. *C* is dead at the time of the promise. The agreement is void but *B* must repay *A* Rs. 1000.
- (b) *A*, a singer contracts with *B* the manager of a theatre to sing at his theatre for two nights in every week during the next two months, and, *B* engages to pay her a hundred rupees for each night's performance. On the sixth night *A* wilfully absent herself from the theatre and *B*, in consequence, rescinds the contract. *B* must pay *A* for the five nights on which she had sung. (*B* can of course claim damages against *A* for breach of contract.)

EXERCISES

1. State the circumstances under which a contract is said to be discharged. (Page 115)
2. Discuss the circumstances under which a contract can be terminated by consent of the parties. (Pages 115-119)
3. What do you understand by 'Novation'? What is the difference between Alteration and Novation? (Page 116)
4. Discuss the effect of supervening impossibility in the performance of a contract. (Pages 119-124)
5. Explain the Law of Frustration of Contract. Give illustrations. (Pages 124-127)
6. Define : Special Damages ; Exemplary Damages ; Nominal Damages. (Pages 131-133)
7. Describe the rules for determination of compensation payable in case of breach of contract. (Pages 128-134)
8. Explain 'Anticipatory breach of contract'. What are the consequences of the breach? (Page 128)
9. What are the consequences of breach of a contract? (Pages 129 -30)
10. State the remedies allowed to the aggrieved person in case of breach of contract. (Pages 128-130)
11. Explain the terms 'Penalty' and 'Liquidated Damages' clearly indicating the difference between the two. (Pages 134-136)
12. What is the effect of a contract on : (i) Strike, Lock-out and Riots, (ii) Material alteration, and (iii) Lapse of time? (Para 3, page 123, 127)

13. Write notes on : (a) Alteration, (b) Remission, (c) Accord and Satisfaction, (d) Rescission, (e) Waiver, (f) Merger, (g) Quantum Meruit.

[(a) 116, (b) 116, (c) 117, (d) 118, (e) 118-119, (f) 119, (g) 137-139]

14. Problem :

(a) *A* pays Rs. 10,000 to *B* in consideration of *B*'s promise to marry *C*, *A*'s daughter. *C* dies and the marriage does not take place. Can *A* claim a refund of the money from *B*? Discuss fully.

(Example (a) page 141)

(b) *A* agreed to let his hall to *B*, for some public entertainment on 1st December, 1965. On 28th November, 1965 the hall was destroyed by accidental fire. Discuss the respective right of *A* and *B*.

(Example (a) page 120)

(c) A debtor agreed to pay compound interest on failure to pay simple interest at the due date. Is it liquidated damage or penalty?

(Page 137)

15. Objective questions. Give short answers :

(i) Write two ways of termination of Contract. (Pages 115)

(ii) Write two remedies of breach of contract. (Page 130)

(iii) State the different damages which can be given for breach of contract. (Pages 131-132)

DEFINITION AND EXPLANATION

When one person obtains a benefit at the expense of another and the circumstances are such that he ought, equitably, to pay for it, the law will compel payment, even though there is no contract between the parties by which payment is promised. The parties will be put in the same position as they would have occupied if there was a contract between them. Such cases are called quasi-contracts because the relationship between the parties in such cases resembles those created by contracts. Sections 68-72 of the Contract Act describe the cases which are to be deemed quasi-contracts under the Indian law.

1. Necessaries for incapable persons

"If a person, incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person."—Sec. 68. (See Page 51)

Examples :

- Sec. 68. See para 6*
- (i) *A* supplies *B*, a lunatic with necessaries suitable to his condition in life. *A* is entitled to be reimbursed from *B*'s property.
 - (ii) *A* supplies the wife and children of *B*, a lunatic with necessaries suitable to their condition in life. *A* is entitled to be reimbursed from *B*'s property.

This section covers the case of necessaries supplied to a minor and other incapable persons (e.g., a lunatic) and to persons whom the incapable person is bound by law to maintain (e.g., his wife and minor children). The things supplied must come within the category of necessaries. The price to be paid is reasonable price—not the price which the incapable person might have "agreed to" (legally speaking an incapable person cannot agree to anything). Only the property of the incapable person is liable. He is not personally liable.

2. Reimbursement of interested persons

"A person who is interested in the payment of money which

another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.”—Sec. 69.

Requisites : The provisions of section 69 are as follows :

1. The payment is to be given to a person interested.
2. The payment is for the protection of his own interest.
3. The person is entitled to repayment.
4. The party must be bound to pay by law.

Examples :

- (i) *B* holds land in Bengal on a lease granted by *A*, the zamindar. The revenue payable by *A* to the Government being in arrear, his land is advertised for sale by the Government. Under the revenue law, the consequence of such sale will be annulment of *B*'s lease. *B* to prevent the sale and the consequent annulment of his own lease, pays to the Government the sum due from *A*. *A* is bound to make good to *B* the amount so paid. (Illustration to Sec 69).
- (ii) *X*'s goods were wrongfully attached in order to realise arrears of Government revenue due by *Y*. *X* pays the amount to save the goods from sale. *X* is entitled to recover the money from *Y*. *Tulsa Kumvar v. Jageshar Prasad*.¹
- (iii) *A*, Hindu mother incurred expenses for her daughter's marriage. She is entitled to recover the expenses from the other members of the Hindu Joint Family. *Vaikuntam v. Kallapiram*.²

3. Benefit of non-gratuitous act

“Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.”—Sec. 70.

The three ingredients to support the cause of action under Section 70 are these : First, the goods are to be delivered lawfully or anything has to be done for another person lawfully. Second, the thing done or the goods delivered is so done or delivered “not intending to do so gratuitously.” Third, the person to whom the goods are delivered “enjoys the benefit thereof.” *Union of India v. Sita Ram Jaiswal*.³

Examples :

- (a) *A*, a tradesman, leaves goods at *B*'s house by mistake. *B* treats the goods as his own. He is bound to pay for them.

¹ (1906) 28 All 563

² (1900) 23 Mad. 512

³ AIR (1977) Supreme Court 329

- (b) *A* saves *B*'s property from fire. *A* is not entitled to compensation from *B* if the circumstances show that he intended to act gratuitously.
- (c) *A* contractor, on the request of an officer of the State of West Bengal, constructed a *Katcha* road, office, kitchen etc, for the clerks. The State accepted the works but tried to evade liability because no contract had been concluded according to the formalities of the Government of India Act. Since the State had enjoyed the benefit of the works, the Supreme Court decreed the contractor's claim. *State of West Bengal v. B. K. Mondal & Sons*.¹
- (d) A person supplied spare motor parts and the Pune Corporation accepted the goods. But the corporation said that the contract of sale was not according to the Bombay Municipal Corporation Act. The claim was decreed by Supreme Court. *Pillo Dhunjishaw v. Municipal Corporation of the city of Poona*.²

4. Finder of goods

"A person who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as a bailee."—Sec. 71 (See pp. 168-169)

5. Delivery by mistake or under coercion

"A person to whom money has been paid, or anything delivered by mistake or under coercion, must repay or return it."—Sec. 72.

"The section in terms does not make any distinction between a mistake of law or mistake of fact. The term 'mistake' has been used without any qualification or limitation whatever." *Sales-tax Officer, Banaras v. Kanhaiya Lal Mukund Lal Saraf*.³

Examples :

- (a) *A* and *B* jointly owe 100 rupees to *C*. *A* alone pays the amount to *C*, and *B*, not knowing this fact, pays 100 rupees over again to *C*. *C* is bound to repay the amount to *B*.
- (b) A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.
- (c) A certain amount of sales-tax was paid by a firm under the U. P. Sales Act under a mistake of law. The firm was allowed to get back the money. See case of *Kanaiya Lal Saraf*, above.

¹ AIR (1962) Supreme Court 779

² AIR (1970) Supreme Court 1201

³ AIR (1959) Supreme Court 135

Compensation in case of Quasi Contracts

Under the Contract Act Section 73, para 3, provides the compensation for loss and damages under the Quasi Contracts. The relevant provision under the Act is quoted below :

"Compensation for failure to discharge obligation resembling those created by contract : When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contract to discharge it and had broken his contract.

Explanation : In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account."

EXERCISES

1. What is a quasi-contract ? Give some examples of quasi-contract.
(Page 143)
2. State the law regarding the following : (a) Necessaries ; (b) Finder of goods.
(Pages (a) 143, (b) 146, 168)
3. A supplies food to C who is a lunatic. C has assets worth Rupees One lac. On non-payment, can A proceed against the assets of C ? Would your answer be the same if C instead of being a lunatic is an infant ?
(Examples (ii) page 143)
4. Objective questions. Give short answers.
 - (i) Write two examples of quasi-contracts. (Page 143)
 - (ii) X, an infant in a school bought eleven fancy waistcoats from Y. He was at the time adequately provided with clothing. Can Y get the price for the waistcoats.

(See *Nash v. Inman*, Page 51)

CONTRACTS OF INDEMNITY**Definition**

Section 124 of the Contract Act defines a contract of indemnity as a contract by which one party promises to save the other party from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person. *P* contracts to indemnify *Q* against the consequences of any proceeding which *R* may take against *Q* in respect of a certain sum of Rs. 200. This is a Contract of Indemnity. *P* is called the *Indemnifier* and *Q* the *Indemnity-holder*.

Characteristics

Characteristics (or the requisites) of a Contract of indemnity are as follows :

1. A contract of guarantee must satisfy all the essential elements of a contract. For example, the object must be lawful, there must be free consent etc.

2. The Contract may be *express or implied*. An express contract is by word or by writing. An implied contract of indemnity comes from the circumstances of the case or the relationship between the parties.

3. Section 69 implies a promise to indemnify (See p. 144)

Definition not exhaustive

Section 124 of the Indian Contract Act does not give an exhaustive definition of contracts of indemnity. This section includes (i) only *express promises* to indemnify and (ii) only those cases where the loss arises from the conduct of the promisor or of any other person. It does not include (i) *implied promises* to indemnify and (ii) cases where loss arises from accidents and events not depending on the conduct of any person.

It has been held in a number of cases in India that a duty to indemnify may arise by operation of law even in the absence of express agreements. A promise to indemnify may be either

express or implied from the circumstances of the case. The illustration given above is an example of an *express promise* to indemnify. The following is an example of an *implied promise* to indemnify.

A broker forged the signature of the holder of a Government promissory note and endorsed it to the Bank of India. The bank got the note renewed from the Government. The holder sued the Government and recovered damages. The Government sued the bank for indemnity. The Privy Council decreed the suit, quoting with approval the following observations of Lord Halsbury : "It is a general principle of law that when an action is done by one person at the request of another which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to indemnity from him who requested that it should be done." *Secretary of State etc. v. Bank of India*.¹

Under English law, contracts of indemnity cover a much wider field than that included in section 124 of the Indian Contract Act. In England contracts of indemnity include promises, express and implied, to indemnify a person from loss caused by events or accidents which may not depend upon the conduct of any person. In a Bombay case it was held that, "Sections 124 and 125 of the Contract Act are not exhaustive of the law of indemnity and the courts here would apply the same equitable principles that the courts in England do." *Gajanan v. Moreshwar*.²

Rights of the Indemnity-holder

Section 125 of the Contract Act lays down that the indemnity-holder is entitled to get from the indemnifier :

1. all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies ;

2. all costs which he may be compelled to pay in such suits (provided he acted prudently or with the authority of the indemnifier) ; and

3. all sums which he may have paid upon compromise of such suit (provided the compromise was prudent or was authorised by the indemnifier).

¹ (1938) 65 I. A. 286 (Privy Council) ² (1942) Bom 402, 670

Comments : It has been held that the rights of the Indemnity-holder, under Section 125, are not exhaustive. The indemnity-holder may be entitled to other equitable reliefs also.

Bombay and Nagpur High Courts have held the indemnifier will be liable only after the actual loss was incurred. But according to the High Courts of Calcutta, Madras and A'lahabad, the indemnity-holder can compel payment from the indemnifier even before he (the indemnity-holder) has met his liability. *Osman Jamal & Sons v. Gopal*.¹

CONTRACTS OF GUARANTEE

Definition

A contract of guarantee is a contract to perform the promise or discharge the liability, of a third person in case of his default.—Sec. 126. *P* lends Rs. 5,000 to *Q* and *R* promises to *P* that if *Q* does not pay the money *R* will do so. This is contract of guarantee. *Q* is called the *Principal Debtor*, *P* the *Creditor*, and *R* the *Guarantor* or the *Surety*.

Classification

Contracts of guarantee may be of three types : (1) for payment to the Creditor to the Principal Debtor by the Guarantor ; (2) payment of price for goods sold, and (3) 'fidelity guarantee' i.e. to discharge the liability of a person for good conduct of a service-holder.

A contract of guarantee may be for (1) a future debt or obligation or for (2) an existing debt.

A guarantee can also be (1) a Simple Guarantee or (2) a Continuing Guarantee (see p. 152)

Essentials of a Valid Guarantee

1. A contract of guarantee must satisfy all the essential elements of a contract. (For example, the object must be lawful ; there must be free consent etc.) But the following points are to be noted.

2. A contract of guarantee may be either oral or written.—Sec 126.

¹ (1919) 56 Cal 262

3. In a contract of guarantee there are three parties i.e., the creditor, the principal debtor and the surety. All the parties must join the contract.

4. In a contract of guarantee, the primary liability is that of principal debtor. The liability of surety arises only when there is a default of the principal debtor. Therefore, the liability of the surety is secondary.

5. In a contract of guarantee the principal debtor may be a minor. In this case the surety is liable to pay even though the minor may not be. The contract will be enforced as between the surety and the creditor.

6. *Consideration* : In a contract of guarantee, the consideration received by the principal debtor is taken to be sufficient consideration for the surety. "Anything done, or any promise made, for the benefit of the principal debtor may be sufficient consideration to the surety for giving guarantee."—Sec.127.

Examples :

- (i) *B* requests *P* to sell and deliver to him goods on credit. *P* agrees to do so, provided *C* will guarantee the payment of the price of goods. *C* promises to guarantee the payment in consideration of *P*'s promise to deliver the goods. This is a sufficient consideration for *C*'s promise.
- (ii) *P* sells and delivers goods to *B*. *C* afterwards requests *P* to forbear to sue *B* for the debt for a year and promises that if he does so, *C* will pay for them in default of payment by *B*. *P* agrees to forbear as requested. This is a sufficient consideration for *C*'s promise.
- (iii) *P* sells and delivers goods to *B*. *C* afterwards, without consideration agrees to pay for them in default of *B*. The agreement is void.

Contracts of Guarantee which are invalid

A contract of guarantee is invalid in the following cases :

1. *Misrepresentation* : Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.—Sec. 142.

2. *Concealment* : Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid.—Sec. 143.

Examples :

- (a) *D* engages *B* as clerk to collect money for him. *B* fails to account for some of his receipts, and *D* in consequence calls upon him to

furnish security for his duly accounting. *C* gives his guarantee for *B*'s duly accounting. *D* does not acquaint *C* with *B*'s previous conduct. *B* afterwards makes default. The guarantee is invalid.

- (b) *G* guarantees to *C* payment for iron to be supplied by him to *B* to the amount of 2000 tons. *B* and *C* have privately agreed that *B* should pay five rupees per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from *G*. *G* is not liable as a surety.

3. *When Co-surety does not join* : Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.—Sec. 144.

4. *Lack of essential elements* : A contract of guarantee is invalid if it lacks one or more of the essential elements of a contract (e.g., if there is want of free consent or if the object is illegal).

DIFFERENCES BETWEEN INDEMNITY AND GUARANTEE

1. In a contract of indemnity, there are *two parties* : the indemnifier and the indemnity-holder. In a contract of guarantee there are *three parties* : the creditor, the principal debtor, and the surety.

2. In a contract of indemnity it is necessary to have only one contract, i.e., between the indemnity-holder and the indemnifier ; in a contract of guarantee it is necessary to have three contracts, between the parties, i.e., between the creditors, the principal debtors and the surety.

3. In a contract of indemnity, the liability of the indemnifier is *primary* ; in a contract of guarantee, the liability of the surety is *secondary* i.e., the surety is liable only if the principal debtor fails to perform his obligations.

4. In a contract of guarantee there is an existing debt or duty, the performance of which is guaranteed by the surety. In a contract of indemnity, the liability of the indemnifier arises only on the *happening of a contingency*.

5. In a contract of indemnity the indemnifier can sue only the indemnity-holder for his loss, because there is no contract between the indemnified and other parties unless there is an assignment on his favour ; in a contract of guarantee the surety can proceed against principal debtor.

6. In a contract of guarantee the surety, after he discharges the debt owing to the creditor, can proceed *against the principal debtor*; in a contract of indemnity the loss falls on the *indemnifier* except in certain special cases.

CONTINUING GUARANTEE

Definition

A guarantee which extends to a series of transactions is called a *Continuing Guarantee*. (Sec. 129). A guarantee covering a single transaction may be called a *Simple Guarantee* or *Specific Guarantee*.

Examples :

- (i) *D*, in consideration that *B* will employ *C* in collecting the rents of *B*'s zamindari, promises *B* to be responsible, to the amount of 5,000 rupees, for the due collection and payment by *C* of those rents. This is a continuing guarantee.
- (ii) *P* guarantees payment to *B* a tea dealer, to the amount of Rs. 1000 for any tea he may from time to time supply to *C*. *B* supplies *C* with tea to the value of Rs. 1000 and *C* pays *B* for it. Afterwards *B* supplies *C* with tea to the value of Rs. 2000. *C* fails to pay. The guarantee given by *P* was a continuing guarantee, and he is accordingly liable to *B* to the extent of Rs. 1000.
- (iii) *P* guarantees payment to *B* of the price of five sacks of flour to be delivered by *B* to *C* to be paid for in a month. *B* delivers five sacks to *C*, *C* pays for them. Afterwards *B* delivers four sacks to *C*, which *C* does not pay for. The guarantee given by *P* was not a continuing guarantee, and accordingly he is not liable for the price of the four sacks.

How a Continuing Guarantee is Revoked

A continuing guarantee is revoked under the following circumstances.

1. *By notice of revocation by the surety* : The notice operates to revoke the surety's liabilities as regards transactions entered into after the notice. He continues to be liable for transactions entered into prior to the notice.—Sec. 130.

2. *By the death of the surety* : "The death of the surety operates, in the absence of a contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions."—Sec. 131.

The estate of the surety is liable for all transactions entered

into prior to the death of the surety unless there was a contract to the contrary. It is not necessary that the creditor must have notice of the death.

A continuing guarantee is *terminated* under the same circumstances under which a surety's liability is discharged. (See below.)

THE EXTENT OF THE LIABILITY OF THE SURETY

Surety's Liability

The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.—Sec. 128.

Example :

G guarantees to *B* the payment of a bill of exchange by *C*, the acceptor. The bill is dishonoured by *C*. *G* is liable not only for the amount of the bill but also for any interest and charges which may have become due on it.

A creditor is not bound first to proceed against the principal debtor. He can sue the surety without suing the principal debtor or without making the principal debtor a co-defendant. When the principal debtor is a minor, the surety alone is liable to the creditor.

Liability of two persons, primarily liable, not affected by arrangement between them that one shall be surety on other's default

Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, the third person not being a party to such contract, the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence.—Sec. 132.

Example :

A and *B* made a joint and several promissory note to *C*. *A* makes it, in fact, as surety for *B* and *C* knows this as the time when the note is made. The fact that *A*, to the knowledge of *C* made the note as surety for *B*, is no answer to a suit by *C* against *A* upon the note.

WHEN IS A SURETY DISCHARGED FROM LIABILITY ?

The liability of a surety under a contract of guarantee comes to an end under any one of the following circumstances :

1. Notice of revocation

In the case of a continuing guarantee, a notice by the surety to the creditor stating that he will not be responsible, will revoke his liability as regards all future transactions. He will remain liable for all transactions entered into prior to the date of the notice.—Sec. 130.

2. Death of surety

In the case of a continuing guarantee the death of a surety discharges him from all liabilities as regards transactions after his death unless there is a contract to the contrary.—Sec. 131.

3. Variation of contract

Any variance, made without the surety's consent in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.—Sec. 133.

Examples :

- (a) *A* becomes surety to *C* for *B*'s conduct as a manager in *C*'s bank. Afterwards *B* and *C* contract, without *A*'s consent, the *B*'s salary shall be raised and that he shall become liable for one-fourth of the losses on overdraft. *B* allows a customer to overdraw, and the bank loses a sum of money. *A* is discharged from his suretyship by the variance made without his consent, and is not liable to make good this loss.
- (b) *C* agrees to appoint *B* as his clerk to sell goods at a yearly salary, upon *A*'s becoming surety to *C* for *B*'s accounting for moneys received by him as such clerk. Afterwards, without *A*'s knowledge or consent, *C* and *B* agree that *B* should be paid by a commission on the goods sold by him and not by a fixed salary. *A* is not liable for subsequent misconduct of *B*.
- (c) *A* gives to *C* a continuing guarantee to the extent of 3,000 rupees for any oil supplied by *C* to *B* on credit. Afterwards *B* becomes embarrassed, and without the knowledge of *A*, *B* and *C* contract that *C* shall continue to supply *B* with oil for ready money and that the payments shall be applied to the then existing debts between *B* and *C*. *A* is not liable on his guarantee for any goods supplied after this new arrangement.

- (d) *C* contracts to lend *B* 5,000 rupees on the 1st March. *A* guarantees repayment. *C* pays the 5,000 rupees to *B* on the 1st January. *A* is discharged from his liability, as the contract has been varied inasmuch as *C* might sue *B* for the money before the 1st March.

4. Release or discharge of principal debtor

The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.—Sec. 134.

Effect of Debt Relief Acts : The Madras High Court held that if the liability of the principal debtor is reduced under the provisions of an Act for debt relief, the surety is liable only for the reduced amount. *Subramania Chettiar v. M. P. Narayanswami Gounder*.¹ The Nagpur and the Kerala High Courts have held similar decisions.

Examples :

- (a) *G* gives a guarantee to *C* for goods to be supplied by *C* to *B*. *C* supplies goods to *B* and afterwards *B* becomes embarrassed and contracts with his creditors (including *C*) to assign to them his property in consideration of their releasing him from their demands. Here *B* is released from his debt by the contract with *C* and *G* is discharged from his suretyship.
- (b) *A* contracts with *B* to grow a crop of sugarcane on *A*'s land and to deliver it to *B* at fixed rate, and *C* guarantees *A*'s performance of this contract. *B* diverts a stream of water which is necessary for irrigation of *A*'s land and thereby prevent him from raising the crops. *C* is no longer liable on his guarantee.
- (c) *D* contracts with *B* for a fixed price to build a house for *B* within a stipulated time. *B* supplying the necessary timber. *C* guarantees *D*'s performance of the contract. *B* omits to supply the timber. *C* is discharged from his suretyship.

5. Arrangement with principal debtor

A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.—Sec. 135.

With a third person

But where a contract to give time to the principal debtor

¹ AIR (1951) Mad. 48

is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.—Sec. 136.

Example :

C, the holder of an overdue bill of exchange drawn by *D* as surety for *B*, and accepted by *B*, contracts with *M* to give time to *B*. *D* is not discharged.

6. Creditor's forbearance to sue does not discharge surety

Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.—Sec. 137.

Examples :

- (i) *B* owes to *C* a debt guaranteed by *G*. The debt becomes payable. *C* does not sue *B* for a year after the debt has become payable. *G* is not discharged from his suretyship.
- (ii) Failure to sue the principal debtor until recovery is barred by Statute of Limitation does not operate as a discharge of the surety. *Mohani Singh v. Ba Yi*.¹

7. Release of one co-surety

Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties.—Sec. 138.

8. Act or omission impairing surety's eventual remedy

If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.—Sec. 139.

Examples :

- (a) *B* contracts to build a ship for *C* for a given sum, to be paid by instalments as the work reaches certain stages. *S* becomes surety to *C* for *B*'s due performance of the contract. *C*, without the knowledge of *S*, prepays to *B* the last two instalments. *S* is discharged by the prepayment.
- (b) *C* lends money to *B* on the security of a joint and several promissory note made in *C*'s favour by *B* and by *S* as surety for *B*, together with a bill of sale of *B*'s furniture, which gives power to *C* to sell

¹ AIR (1939) P. C. 410 (Privy Council)

the furniture, and apply the proceeds in discharge of the note. Subsequently, *C* sells the furniture, but, owing to his misconduct and wilful negligence, only a small price is realised. *S* is discharged from liability on the note.

- (c) *S* puts *M* as apprentice to *B*, and gives a guarantee to *B*, for *M*'s fidelity. *B* promises on his part that he will, at least once a month, see *M* make up the cash. *B* omits to see this done as promised, and *M* embezzles. *S* is not liable to *B* on his guarantee.

9. Loss of security

If the creditor loses or parts with any security given to him by the principal debtor at the time the contract to guarantee was entered into, the surety is discharged to the extent of the value of the security, unless the surety consented to the release of such security.—Sec. 141.

10. Miscellaneous

A contract of guarantee is invalid if it is obtained by means of misrepresentation (Sec. 142), silence as to material circumstances (Sec. 143), or if a co-surety fails to join according to the terms of the contract (Sec. 144). See pp. 150-151.

THE RIGHTS OF THE SURETY

A surety has the following rights :

Against the Principal Debtor

1. *Right of Subrogation* : Upon payment of performance of all that he is liable for, he is invested with all the rights which the creditor had against the principal debtor.—Sec. 140.

2. *Right to Indemnity* : In every contract of guarantee there is implied promise by the principal debtor to indemnify the surety ; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.—Sec. 145.

Examples :

- (a) *B* is indebted to *C* and *A* is surety for the debt. *C* demands payment from *A*, and on his refusal sues him for the amount. *A* defends the suit, having reasonable grounds for doing so, but is compelled to pay the amount of the debt with costs. He can recover from *B* the amount paid by him for costs, as well as the principal debt.
- (b) *C* lends *B* a sum of money and *A*, at the request of *B* accepts a bill of exchange drawn by *B* upon *A* to secure the amount. *C*, the

holder of the bill, demands payment of it from *A*, and on *A*'s refusal to pay, sues him upon the bill. *A* not having reasonable grounds for so doing, defends the suit, and has to pay the amount of the bill and costs. He can recover from *B* the amount of the bill, but not the sum paid for costs, as there was no real ground for defending the action.

- (c) A surety settled with the creditor by paying a sum smaller than the amount guaranteed. Held, he can recover only what he paid. *Reed v. Norris*.¹

Against the Creditor

Right of Security : A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into. Whether the surety knows of the existence of security or not is immaterial.—Sec. 141.

“The expression ‘security’ in Section 141 is not used in any technical sense ; it includes all rights which the creditor had against the property of the principal debtor at the date of contract.” *State of M. P. v. Kaluram*.²

Examples :

- (a) *C* advances to *B* his tenant, 2000 rupees on the guarantee of *A*. *C* has also a further security for the 2000 rupees by a mortgage of *B*'s furniture. *B* cancels the mortgage. *B* becomes insolvent, and *C* sues *A* on his guarantee. *A* is discharged from liability to the amount of the value of the furniture.
- (b) *C*, a creditor whose advance to *B* is secured by a decree, receives also a guarantee for that advance from *A*. *C* afterwards takes *B*'s goods in execution under the decree, and then, without the knowledge of *A*, withdraws the execution. *A* is discharged.
- (c) *A* is surety for *B*, makes a bond jointly with *B* to *C*, to secure a loan from *C* to *B*. Afterwards, *C* obtains from *B* a further security for the same debt. Subsequently, *C* gives up the further security. *A* is not discharged.

Against the Co-surety—See Below.

CONTRIBUTION BETWEEN CO-SURETIES

Definition

Where several persons guarantee a debt or duty, they are called co-sureties.

¹ 2 Bing 361

² AIR (1967) Supreme Court 1105

Co-sureties liable to contribute equally

Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties in the absence of any contract to the contrary, are liable as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.—Sec. 146.

Examples :

- (a) *A, B and C are sureties to D for the sum of 3,000 rupees lent to E. E makes default in payment. A, B and C are liable as between themselves, to pay 1000 rupees each.*
- (b) *A, B and C are sureties to D for sum of 1000 rupees lent to E and there is a contract between A, B and C that A is to be responsible to the extent of one-quarter, B to the extent of one-quarter, and C to the extent of one-half. E makes default in payment. As between the sureties A is liable to pay 250 rupees, B 250 rupees and C 500 rupees.*

Liability of Co-sureties bound in different sums

Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.—Sec. 147.

Examples :

- (a) *A, B and C as sureties for D, enter into three several bonds, each in a different penalty, namely A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 30,000 rupees. A, B and C are each liable to pay 10,000 rupees.*
- (b) *A, B and C, as sureties for D, enter into three several bonds each in a different penalty, namely A in the penalty of 10,000 rupees, B in the that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 40,000 rupees. A is liable to pay 10,000 rupees, and B and C 15,000 rupees.*

Release of one co-surety — See para 7, p. 156.

EXERCISES

1. Define a contract of indemnity. Distinguish between a contract of guarantee and a contract of indemnity. (Pages 147, 150)
2. Discuss the nature and extent of the liability of a surety. (Page 153)

3. State the law relating to continuing guarantee. (Page 152)
4. What are the rights of a surety against the principal debtor and against the co-sureties. (Pages 157-159)
5. Explain the rule that between co-sureties there is equality of the burden and benefit. (Pages 158-159)
6. *Problems* : (a) *B* owes to *C* a debt guaranteed by *A*. The debt becomes payable. *C* does not sue for a year after the debt has become payable. Is *A* discharged from his suretyship? Give reasons. (Example (i) page 156)
(b) *P* sells and delivers goods to *B*. *C* afterwards, without consideration, agrees to pay for them in default of *B*. Is the agreement valid? Give reasons. (Example (iii), page 150)
7. Objective question. Give short answer.
(i) Give an example of continuing guarantee. (Page 152)



DEFINITION AND FEATURES*** Definition of Bailment**

"A bailment is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished be returned or otherwise disposed of according to the directions of the persons delivering them".—Sec. 14.

The person delivering the goods is called the *Bailor*. The person to whom they are delivered is called the *Bailee*. The transaction is called *Bailment*.

Examples :

- (i) *P* lends his book to *Q*.
 - (ii) *P* delivers a pen to *Q* for repair.
 - (iii) *P* gives *Q* his watch as security for a loan.
- In all these cases *P* is the bailor and *Q* is the bailee.

Characteristic Features or the Requisites of Bailment

Bailment has the following characteristic features :

1. *Delivery* : It is delivery of goods by one person to another.
2. *Purpose* : The goods are delivered for some purpose.
3. *Return* : It is agreed, that when the purpose is accomplished the goods are to be returned or otherwise disposed of according to the direction of the bailor.
4. *Contract* : Bailment arises from express or implied contract. In case of finder of goods bailment arises by implication of law.
5. *Ownership* : In bailment the bailor continues to be the owner of the goods. Therefore bailment does not cause any change of ownership.
6. *Movable goods* : Bailment is concerned with only movable goods. Money is not included in the category of movable goods. A deposit of money is not bailment.

Deposit of money in a bank does not constitute bailment. The relationship between depositor and the bank is that of borrower and the lender.

7. *Possession* : A person already in possession of the goods may become a bailee by a subsequent agreement, express or implied.

Example :

X is a seller of motor cars, having several cars in his possession. *Y* buys a car and leaves the car in the possession of *X*. After the sale is complete, *X* becomes a bailee, although originally he was the owner.

Delivery to bailee how made

"The delivery of goods to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorised to hold them on his behalf".—Sec. 149.

Different kinds of Bailment

Bailments may be classified into ; (1) *Gratuitous Bailments* and (2) *Bailment for Reward*.

A gratuitous bailment is one in which neither the bailor, nor the bailee is entitled to any remuneration, e.g., loan of an article *gratis* ; safe custody without charge, etc.

A bailment for reward is one where either the bailor or the bailee is entitled to a remuneration, e.g., a motor car let out for hire ; goods given to a carrier for carriage at a price ; articles given to a person for being repaired for a remuneration ; pawn, etc.

DUTIES OF THE BAILEE

1. Duty of reasonable care

The bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.—Sec. 151.

The degree of care to be taken by a bailee is that of a man of ordinary prudence. If he takes that amount of care, he will not be held responsible for loss, destruction or deterioration of the goods bailed. (Sec. 152). The degree of care required from the bailee is the same whether the bailment is for reward or is gratuitous.

There may be a special contract between the bailor and the bailee by which the bailee is required to take a higher degree

of care or under which he is responsible for compensating in full for loss, destruction or deterioration of the goods. Such special terms are usually incorporated in contracts of carriage.

2. Bailee's liability for negligence of servants

A bailee is liable for damages caused by negligence of the servants about the use or custody of the things bailed, when acting in course of their employment. But the bailee is not liable for damages caused by the acts or default of third person which cannot be prevented by ordinary diligence. The bailee is also not liable for unauthorised acts of his servants outside the scope of their employment. *Sanderson v. Collins*.¹

3. Unauthorised use of goods

If the bailee makes unauthorised use of goods bailed, i.e., uses them in a way not authorised by the terms of the bailment, he is responsible for all damages to the goods and must pay compensation to the bailor. This liability arises even if the bailee is not guilty of any negligence, and even if the damage is the result of accident.—Sec. 154.

Examples :

- (i) A lends a horse to B for his own riding only. B allows C, a member of his family, to ride the horse. C rides with care, but the horse accidentally falls and is injured. B is liable to make compensation to A for the injury done to the horse.
- (ii) A hires a horse in Calcutta from B expressly to march to Benares, A rides with due care, but marches to Cuttack instead. The horse accidentally falls and is injured. A is liable to make compensation to B for the injury to the horse.

4. Mixture of Bailor's goods with the Bailee's

If the bailee mixes up his own goods with those of the bailor, the following rules apply :

(a) "If the bailee, with consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced."—Sec. 155.

(b) "If the bailee, without the consent of the bailor mixes the goods of the bailor with his own goods, and the goods can

¹ (1904) 1 K. B. 628

be separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expense of separation or division, and any damage arising from the mixture."—Sec. 156.

Example :

D bails 100 bales of cotton marked with a particular mark to *B*. *B* without *D*'s consent mixes the 100 bales with other bales of his own, bearing a different mark. *D* is entitled to have his 100 bales returned, and *B* is bound to bear all the expenses incurred in the separation of the bales, and any other incidental damage.

(c) "If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods."—Sec. 157.

Example :

D bails superior flour worth Rs. 45 to *B*. *B*, without *D*'s consent mixes the flour with inferior flour of his own, worth only Rs. 25. *B* must compensate *D* for the loss of his flour.

5. Duty of returning goods

It is the duty of the bailee to return or deliver according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished."—Sec. 160.

"If, by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time."—Sec. 161.

Example :

G agreed to carry certain goods of *B* expeditiously. The driver of the van which was carrying the goods, left the van unattended for one hour for lunch. During that time the goods were stolen, *B* filed a suit for damages against *G*. Held, the carrier has a duty viz., to deliver the goods or return them. The carrier could not do so. The van driver's departure constitutes a fundamental breach of the contract to carry the goods forthwith to the destination. Damages were awarded. *Bontex Knitting Works Ltd. v. St. John Garage*.¹

¹ (1944) 2 All E. R. 690

6. Accretion to the goods bailed

"In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed."—Sec. 163.

Example :

C leaves a cow in the custody of B to be taken care of. The cow has a calf. B is bound to deliver the calf as well as the cow to C.

7. Liabilities of Innkeeper and Hotelkeepers

In England Innkeepers were governed by the Common Law. They were regarded as insurers, i.e., loss of or damages to customer's goods had to be fully made up, except certain special cases. This rule was applied in Bombay High Court in an old case (1886). It is now held that the liabilities of innkeepers and hotel-keepers are as bailees and are governed by Sections 151 and 152 of the Contract Act. (See para 1, p. 162) *Rampal Singh v. Murray & Co.*¹; *Jan & Son v. Cameron.*²

8. Liabilities of Carriers—See Book V, Ch 1.

DUTIES OF THE BAILOR

1. Bailor's duty to disclose faults in goods bailed

"The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risk, and, if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the good bailed."—Sec. 150.

Examples :

- (i) A lends a horse which he knows to be vicious to B. He does not disclose the fact that the horse is vicious. The horse runs away, B is thrown and injured. A is responsible to B for damage sustained.
- (ii) A hires a carriage of B. The carriage is unsafe, though B is not aware of it, and A is injured. B is responsible to A for the injury.

¹ (1899) 22 All 164

² (1922) 44 All 735

2. Payment of expenses in Gratuitous Bailments

“Where by the conditions of the bailment, the bailee is to receive no remuneration, the bailor shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.”—Sec. 158.

3. Responsibility for breach of warranty of title

The bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods or to give direction respecting them.—Sec. 164.

Example :

A gives B's car to C for use without B's knowledge of permission. B sues C and receives compensation. C is entitled to recover his losses from A.

BAILEE'S RIGHTS

1. Enforcement of rights

The bailee can, by suit, enforce the duties of the bailor.

2. Bailment by several joint owners

“If several joint owners of goods bail them, the bailee may deliver them back to, or according to the directions of, one joint owner without the consent of all, in the absence of any agreement to the contrary.”—Sec. 165.

3. Bailee not responsible on re-delivery to bailor without title

“If the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or according to directions of the bailor, the bailee is not responsible to the owner in respect of such delivery.”—Sec. 166.

4. Bailee's Particular Lien

Lien means the rights to retain property until some debt or claim is paid. The right of lien is given by law in certain cases. Lien may be of two types : General Lien and Particular Lien. General lien means the right to retain *all* the goods of the other party until *all* the claims of the holder are paid. Particular lien means the right to retain particular goods until claims on account of those goods are paid.

A bailee has a particular lien, when he has rendered any service upon an article and is entitled to some remuneration for it according to the terms of the contract between him and the other party. The following limitations upon the bailee's particular lien are to be noted.—Sec. 170.

- (i) The particular lien is available only if the service rendered by the bailee is one involving the *exercise of labour or skill* in respect of the goods bailed. There is no lien for custody charges or other charges for work not involving labour or skill.
- (ii) The right of lien cannot be exercised until the services have been performed in full. When a bailee has done only a part of the work contracted for he cannot claim lien for part payment.
- (iii) The lien cannot be claimed if there is an agreement to pay the money on a future date.
- (iv) The lien can be exercised only so long as the goods are in the possession of the bailee. If possession is lost for any reason, the lien is also lost.

Examples :

- (i) *A* delivers a rough diamond to *B*, a jeweller, to be cut and polished, which is accordingly done. *B* is entitled to retain the stone till he is paid for the services he has rendered.
- (ii) *A* gives cloth to *B*, a tailor, to make into a coat, *B* promises *A* to deliver the coat as soon as it is finished, and to give a three months' credit for the price. *B* is not entitled to retain the coat until he is paid.

5. Bailee's General Lien

Section 171 provides that bailees coming within the following categories have a general lien : bankers, factors, wharfingers, attorneys of High Court, and policy brokers. Such bailees can retain all goods of the bailor so long as anything is due to them. The general lien in all these cases may not exist if there is a contract to the contrary. Bailees falling in categories other than those mentioned above may have a general lien if there is an express agreement to that effect.

BAILOR'S RIGHTS

1. Enforcement of rights

The bailor can enforce by suit all the liabilities or duties of the bailee.

2. Act inconsistent with the terms

"A contract of bailment is voidable, at the option of the bailor, if the bailee does any act with regard to the goods bailed inconsistent with the conditions of the bailment."—Sec. 153.

Example :

A lets to B, for hire, a horse his own riding. B drives the horse in carriage. This is, at the option of A, a termination of the bailment.

3. Restoration of goods lent gratuitously

When goods are lent gratuitously, the bailor can demand their return whenever he pleases, even though he lent it for a specified time or purpose. But if the bailee in such cases had acted in such a manner that the return of the goods before the stipulated time would cause loss greater than the benefit which he has received, the bailor must indemnify him for the loss if he compels an immediate return.—Sec. 159.

TERMINATION OF BAILMENT

A contract of bailment terminates under the following circumstances :

1. *Efflux of time* : If the bailment is for a stipulated period, the bailment terminates as soon as the stipulated period expires.

2. *Fulfilment of purpose* : If the bailment is for a specific purpose, the bailment terminates as soon as the purpose is fulfilled.

3. *Act inconsistent with the terms* : If the bailee does any act, with regard to the goods bailed, which is inconsistent with the terms of the bailment, the bailment terminates.—Sec. 153.

4. *Goods lent gratuitously* : A gratuitous bailment can be terminated any time but if premature termination causes any loss to the bailee, the bailor must indemnify the bailee.—Sec. 159.

5. *Death* : A gratuitous bailment terminates upon the death of either the bailor or the bailee.—Sec. 162.

RIGHTS AND DUTIES OF FINDER OF GOODS

Rights

A finder of goods is in the position of a bailee if he takes charge of the goods. (See p. 132) The rights of the finder of goods can be summarised as follows.—Sections 168 and 169 :

1. *Possession* : He can retain possession of the goods against everybody except the true owner.

2. *Compensation and Lien* : He is entitled to be compensated for the trouble and expense incurred by him to preserve the goods and to find out the owner. He has a lien upon the goods for the payment of these sums *i.e.*, he can refuse to return the goods until they are paid.

3. *Reward* : He cannot file a suit for the expense he has incurred but can sue for any reward which the owner might have offered for the return of the goods lost.

4. *Sale* : If the goods found are commonly the subject-matter of sale and if the owner cannot with reasonable diligence be found or if he refuses to pay the lawful charges of the finder, the goods can be sold provided the following further conditions are fulfilled—

- (a) When the thing is in danger of perishing or of losing the greater part of its value.
- (b) When the lawful charges of the finder amount to two-thirds of its value.

Duties and Obligations

The finder of goods is a bailee. Therefore, he has the following duties and obligations : (i) He must take reasonable care of the goods (Sec. 151). (ii) He must not mix the finder's goods with his own goods (Secs. 155-157). (iii) The goods must be returned to the real owner (Secs. 160 & 161). (iv) If there is an accretion to the goods bailed, it must be given to the real owner (Sec. 163). (v) He must not use the goods for his purpose. (vi) He must try to find out the true owner of the goods. //

SUITS BY BAILEES OR BAILORS AGAINST WRONG-DOERS

1. Right to interplead

If a person, other than the bailor, claims the goods bailed, he may apply to the courts to stop delivery of the goods bailed and to decide the title to the goods.—Sec. 167.

2. Suit by bailor or bailee against wrong-doer

If a third party wrongfully deprives the bailee of the use of the goods bailed or does them any injury, the bailee is entitled

to use all such remedies as the owner of the goods might have used. Either the bailee or the bailor may file a suit against the third party in such cases.—Sec. 180.

3. Apportionment of relief or compensation obtained by such suits

Whatever is obtained by way of relief or compensation in any such suits shall, as between the bailor and the bailee be dealt with according to their respective interests.—Sec. 181.

BAILMENTS BY WAY OF PLEDGE OR PAWN

Definition

The bailment of goods as security for payment of a debt or performance of a promise is called *Pledge* or *Pawn*. The bailor in this case is called the *Pledgor* or the *Pawnor*. The bailee is called the *Pledgee* or the *Pawnee*.—Sec. 172.

Difference between Bailment and Pledge

Pledge is a particular kind of bailment. The difference between Pledge and other kinds of bailment lies in the purpose or objective of the transaction. The purpose of a pledge is to provide security for a debt or the performance of a promise. In other kinds of bailment there are other purposes for example, repair, safe-custody etc. The pledgor and the pledgee have certain special rights and duties.

When can a non-owner make a valid Pledge ?

The owner of goods can always make a valid pledge. In the following cases, one who is not an owner can make a valid pledge.

1. Mercantile Agent

A mercantile agent who is, with the consent of the owner, in possession of the goods or of the documents of title to goods, can make a valid pledge of the goods while acting in the ordinary course of business of a mercantile agent. Such a pledge will be valid even if the agent had no authority to pledge, provided that the pawnee acts in good faith and has not at the time of the pledge any notice that the pawnor has no authority to pledge.—Sec. 178.

2. Possession under a voidable contract

A person having possession of goods under a voidable contract can make a valid pledge of the goods so long as the contract is not rescinded. The pawnee gets a good title to the goods provided he acts in good faith and without notice of the pawnor's defect of title.—Sec. 178A.

Example :

A gets an ornament by inducing the owner to sell it to him by undue influence. Before the contract is rescinded by the owner, he pawns it to *B*. *B* will get a good title to the ornament provided he acted in good faith and was unaware of *A*'s defective title.

3. Pawnor with a limited interest

Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.—Sec. 179.

4. Possession with co-owner

If one of several co-owners is in sole possession of the goods with the consent of the owners, he can make a valid pledge of the goods.—Sec. 30 (1). Sale of Goods Act.

RIGHTS OF PLEDGEE OR PAWNEE

1. Right of Retainer

"The pawnee can retain the goods pledged not only for payment of the debt or the performance of the promise, but also for the interest of the debt and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged."—Sec. 173.

2. Retainer for subsequent advance

The pawnee's lien is a particular lien, *i.e.*, he cannot retain the goods for any debt other than the debt for which the security was given unless there is an express contract to the contrary. If the pawnee makes fresh advances to the same debtor it will be presumed that the debtor has agreed to create on the goods already pledged a lien for the fresh advance.—Sec. 174

3. Extraordinary expenses

The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged.—Sec. 175.

4. Pawnee's right where pawnor makes default

"If the pawnor makes a default in payment of the debt, or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as collateral security ; or, he may sell the thing pledged on giving the pawnor reasonable notice of the sale.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.—Sec. 176.

RIGHTS OF PLEDGOR

1. Defaulting pawnor's right to redeem

"If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them ; but he must, in that case, pay, in addition, any expenses which have arisen from his default."—Sec. 177.

2. Preservation and maintenance

The pledgor can enforce the preservation and proper maintenance of the goods pledged.

3. Protection of debtors

The pledgor as a debtor has various rights given to him by statutes enacted for the protection of debtors e.g., the Money-lenders Acts.

EXERCISES

1. Define bailment. State the degree of care to be taken by a bailee. What are the duties of the bailee ? (Pages 161-165)
2. What is a pledge ? What are the rights of a pawnee ? (Pages 170-172)
3. Can a person other than the true owner make a valid pledge of goods ? (Page 170)

4. Define bailment. State the rights and liabilities of a finder of goods.
(Pages 161, 168-169)
5. Explain 'Bailment'. What are the rights of the parties in case of accretion during the period of bailment? (Pages 161, 165)
6. State the pawnee's rights when the pawnor makes default.
(Pages 171-172)
7. Write notes on the following :
 - (a) Mixture of bailor's goods with the bailee's. (Page 163)
 - (b) Negligence of servants. (Para 2, page 163)
 - (c) Liabilities of Hotel-keepers. (Para 7, page 165)
 - (d) Right of Retainer. (Para 1 & 2, page 171)
8. Distinguish between :
 - (i) Bailor and Bailee. (Page 161)
 - (ii) Finders of goods and Bailee. (Pages 161, 168)
 - (iii) Bailment and Pledge. (Page 170)
 - (iv) Bailee's Particular Lien and Bailee's General Lien.
(Pages 166-167)
9. Objective questions. Give short answers :
 - (i) "A deposit of money in a bank is not bailment." True or false ?
(Para 6, page 161)
 - (ii) "A bailee has a duty to return the goods bailed." True or false ?
(Para 5, page 164)
 - (iii) Give three examples of termination of bailment. (Page 168)
 - (iv) What is 'Pawn' ? (Page 170)
10. Problems :
 - (a) *A* lends his horse to *B* for his own riding only. *B* allows *C*, a member of his family to ride the horse. *C* rides with care, but the horse accidentally falls and is injured. What remedy has *A* against *B* ? (Example (i), page 163)
 - (b) *A* hires a motor car of *B*. The car is unsafe, though *B* is not aware of it, and *A* is injured. Is *B* responsible to *A* for the injury ? (Example (ii), page 165)
 - (c) *A* kept some valuable ornaments in the custody of *B*, his neighbour, *B* kept *A*'s ornaments along with his own. *A*'s ornaments as well as *B*'s ornaments were lost on account of carelessness of *B*. Can *A* hold *B* responsible for his loss ? (Para 1, page 162)
 - (d) *A* leaves a cow in the custody of *B* to be taken care of. The cow has given birth to a calf. Who is entitled to the calf ?
(Para 6, page 165)

DEFINITIONS

✓ Definition and Nature of Agency

“An ‘Agent’ is a person employed to do any act for another or to represent another in dealings with third persons.”—Sec. 182.

The person for whom such act is done, or who is so represented, is called the *Principal*. *P* appoints *X* to buy 50 bales of cotton on his behalf. *P* is the principal and *X* is his *Agent*. The relationship between *P* and *X* is called *Agency*.

✓ Power of Attorney

An Agent may be appointed by the Principal, executing a written and stamped document. Such a document is called Power of Attorney. There are two kinds of Power of Attorney : General and Special. A general power is one by which the agent is given an authority to do certain general objectives, e.g., managing an estate or a business. A special or particular power may be appointed by which an agent is authorised to do a specific thing, e.g., selling some goods. A man dealing with a particular agent is bound to find out the limits of the authority by which the authority of the agent can act accordingly.

✓ Enforcement and consequences of Agent's contracts

The function of an agent is to bring about contractual relations between the principal and third parties. Usually agents are appointed with specific instructions and authorised to act within the scope of their instructions. Acts of the agent within the scope of the instructions bind the principal as if he has done them himself. There is a legal maxim regarding agency viz., ‘*Qui facit per alium facit per se*’, which means—“He who does through another does by himself.” The act of an agent is the act of the principal.

“Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner and will have the same legal consequences, as if the

contracts had been entered into and the acts done by the principal in person.”—Sec. 226.

Examples :

- (a) *A* buys goods from *B*, knowing that he is an agent for their sale, but not knowing who is the principal. *B*'s principal is the person entitled to claim from *A* the price of the goods, and *A* cannot in a suit by the principal, set off against the claim a debt due to himself from *B*.
- (b) *A*, being *B*'s agent with authority to receive money on his behalf, receives from *C* a sum of money due to *B*. *B* is discharged of his obligation to pay the sum in question to *B*.

The Test of Agency

Agency exists whenever a person can bind another by acts done on his behalf. When this power does not exist the relationship is not one of agency. Thus a wife is not the agent of the husband except under special circumstances and for special purposes. But the constituted attorney of a person is his agent for the purposes mentioned in the power of attorney.

Agent and Servant

The differences between an Agent and a Servant were discussed in the case *Lakhminarayan Ram Gopal & Sons v. Hyderabad Government*.¹ The points are summarised below.

1. An agent is to exercise his authority in accordance with the principal's instructions ; but he is not subject to the principal's direct control or supervision. A servant has to act according to the orders of the master in every particular.
2. An agent is appointed and employed to bring the principal into contractual relationship with third parties. The servant cannot do that.
3. An agent can bind the principal to the third parties. A servant cannot do so.
4. The mode of remuneration of an agent may vary, including a commission on the basis of the work done. A servant is generally paid through wages.
5. An agent is liable for wrong done within the scope of his authority. A master is liable for the wrong of his servant if it is committed in course of the servant's employment.

¹ AIR (1954) Supreme Court 364

6. An agent may work for several principals. A whole-time servant serves only one master.

7. A servant can, however, be appointed as an agent for some purposes.

Agent and an Independent Contractor

A person who undertakes to do something for another is called an independent contractor, if the manner of doing the thing is left to him. An independent contractor does not represent the other contracting party nor can he bind him by contracts entered into with others. An agent is one who acts according to the instructions of the principal and can bind the principal by entering into contracts with other persons within the scope of his authority.

Agent and Bailee

The differences between an Agent and a Bailee are summarised below.

1. The bailee has possession of goods of the bailor. An agent may not have possession of any goods or property of the principal.

2. The bailee has no power to create any contractual relationship with the third party. An Agent has that authority.

3. Under certain circumstances a bailee may act as an agent.

Who can appoint an Agent ?

"Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent."—Sec. 183.

Who may be an Agent ?

Any person may be an agent, even a minor. A minor acting as agent can bind the principal to third parties. But a minor is not himself liable to his principal.—Sec. 184.

Joint Principals

Several principals can jointly appoint *one* agent. The agent can act in respect of those affairs in which all the co-principals are jointly interested. The Power of Attorney, by virtue of which the agent was created, has to be strictly construed and what it authorized depend on the terms and the purposes for which it

was executed. *Syed Abdul Khader v. Rami Reddy and others*.¹ The Supreme Court in the judgment quoted Halsbury, "co-principals may jointly appoint an agent to act for them and in such case become jointly liable to him and may jointly sue him."²

Consideration in Agency Contracts

No consideration is necessary to create an agency (Sec. 185). The acceptance of the office of an agent is regarded as sufficient consideration for the appointment. The agency contract generally provides for the amount of remuneration payable by the principal to the agent.

✓ DIFFERENT CLASSES OF AGENTS

The relationship between the principal and agent and the extent of the authority of the latter are matters to be determined by agreement of the parties.

There are, however, certain well-known varieties of agency contracts where the powers and duties of the agent are settled by usage and custom of trade recognised by the courts of law. Some of these particular kinds of agency-contracts, together with their legal incidents are described below.

1. Broker

A broker is one who brings buyers and sellers into contract with one another. His duties are at an end when the parties are brought together. The contract of sale and purchase is entered into directly by the parties. The broker does not keep the goods or the property of the principal in his possession.

2. Factor

A factor is a mercantile agent with whom goods are kept for sale. He has got discretionary powers to enter into contracts of sale with third parties. He has a general lien on the goods for money due to him as agent.

3. A Commission Agent

A commission agent is one who secures buyers for a seller of goods and sellers for a buyer of goods in return for a

¹ AIR (1979) Supreme Court 553

² Halsbury's Laws of England, vol I, 4th Ed., para 726

commission on the sale. A commission agent may have possession of the goods or not. His position is very similar to that of a broker.

4. Auctioneer

An auctioneer is one who is authorised to sell goods of his principal by auction. He has a particular lien on the goods for his remuneration. He has the goods in his possession and can sue the buyer in his own name for the purchase price. An auctioneer acts in a double capacity. Up to the moment of sale he is the agent of the seller. After the sale he is the agent of the buyer. An auctioneer has implied authority to sell the goods without any restriction. Therefore a sale by him in violation of instructions is binding on the owner. If the owner directs the auctioneer not to sell below a reserve price and the auctioneer sells it below the price the sale is binding on the owner except in cases where the buyer knew that there was a limitation on the auctioneer's authority.

5. A Del Credere Agent

A *del credere* agent is one who, for extra remuneration, guarantees the performance of the contract by the other party. If the other party fails to pay the price or otherwise causes damage to the principal, the *del credere* agent must pay compensation to the principal.

6. General Agent and Particular Agent

A general agent is one who represents the principal in all matters concerning a particular business. A particular agent is one who is appointed for a specific purpose e.g., to sell a particular article. Factors and commission agents are usually general agents.

METHODS OF CREATING AGENCY

Agency may be created in any one of the following ways:

1. Agency by Express Agreement

A contract of agency may be created by express agreement. The agreement may be either oral or written. It is usual in many cases to appoint agents by executing a formal power of attorney on a written and stamped document.

2. Agency by Implied Agreement

An agency agreement may be implied under certain circumstances from the conduct of the parties or the relationship between them. Agency by estoppel and agency of necessity are cases of implied agency.

3. Agency by Estoppel or by Holding Out

Agency may be created by estoppel. When a man has by his conduct or statements induced others to believe that a certain person is his agent, he is precluded from subsequently denying it. Thus an agency is created by implication of law.

Examples :

- (i) *Y* allows his servant *X* to buy goods for him on credit regularly. On one occasion the servant buys some goods not ordered by his master, on credit. *Y* is responsible to the shopkeeper for the price because *X* will be deemed to be his agent by estoppel.
- (ii) *P* employed *X* a broker, to buy hemp for him and at *P*'s request it was kept in a warehouse in *X*'s name. *X* without *P*'s authority sold the hemp. Held, *P* was bound by the sale because he had allowed *X* to assume the apparent right of disposing of the hemp in the ordinary course of business. *Pickering v. Bush*.¹

There are three possible cases of agency by estoppel :

(a) A person can be held out as an agent although he is actually not so—*Example (i)* above.

(b) A person acting as an agent may be held out as having more authority than he actually has—*Example (ii)* above.

(c) A person may be held out as agent after he has ceased to be so.

Section 237 provides as follows : "When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations if he has by his words or conduct induced such third persons to believe that such acts or obligations were within the scope of the agent's authority."

Examples :

- (a) *A* consigns goods to *B* for sale and gives him instructions not to sell under a fixed price. *C*, being ignorant of *B*'s instructions, enters into a contract with *B* to buy the goods at a price lower than the reserved price. *A* is bound by the contract.

¹ (1812) 15 East 38

- (b) *A* entrusts *B* with negotiable instruments endorsed in blank. *B* sells them to *C* in violation of private orders from *A*. The sale is goods.

4. Agency of Necessity

Circumstances sometimes force a person to act on behalf of another without any express authority from him. In such cases an agency of necessity is said to be created.

Three conditions must be satisfied before an agency can be created by necessity: (a) It must be impossible to get the principal's instructions. (b) There must be an actual necessity for acting on his behalf. (c) The agent of necessity must act honestly in the interest of the parties concerned.

Examples :

- (i) The captain of a ship finds himself in a distant port without money. The owner cannot be communicated with. The captain can pledge the ship for obtaining money. He will be considered the agent of the owner by necessity.
- (ii) A horse, sent by a train, arrived at a station with nobody to receive it. The railway company fed the horse. Held, the railway company was an agent of necessity and was entitled to recover the money from the owner. *G. N. Ry v. Swaffield*.¹

Husband and Wife

A wife is an agent of necessity, having power to pledge her husband's credit for necessities of life, when she is not properly provided for by him or when she has been deserted by the husband. But if the husband gives her a sufficient allowance, she has no authority to pledge his credit and can never be the agent of necessity. In *Gray (Miss) Ltd. v. Cathcart*² a wife was supplied with clothes of the value of £ 215 by a shopkeeper. The shopkeeper sued the husband. It was found that the husband was giving the wife an allowance of £ 960 per year. It was held that the husband was not liable to pay the dues of the shopkeeper.

The general rule is, that the wife is not the agent of her husband and the husband is not the agent of his wife. But one of them may be the agent of the other by express appointment, by holding out, by ratification, or because of necessity.

5. Agency by Ratification

Ratification means the subsequent adoption and acceptance

¹ (1874) L. R. 9 Ex. 132

² (1922) 38 T.L.R. 562

of an act originally done without instructions or authority. *P* buys ten maunds of wheat on behalf of *Q*. *Q* did not appoint *P* as his agent and did not instruct him to buy wheat for him. *Q* may, upon hearing of the transaction, accept it. If he does so, the act is ratified and *P* becomes his agent with retrospective effect.

Effect of ratification : "Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratifies them, the same effects will follow as if they had been performed by his authority."—Sec. 196.

Ratification may be express or implied, *i.e.*, it may be by express words or by conduct.—Sec. 197.

Examples of implied ratification :

- (i) *D*, without authority, buys goods for *B*. Afterwards *B* sells them to *C* on his own account. *B*'s conduct implies a ratification of the purchase made by *D* for him.
- (ii) *D*, without *B*'s authority lends *B*'s money to *C*. Afterwards *B* accepts interest on the money from *C*. *B*'s conduct implies a ratification of the loan.

Ratification when validly made is retrospective in operation, *i.e.*, it relates back and dates from the time when the agent entered into the contract.

Conditions : To be valid, a ratification must fulfil the following conditions :

1. The agent must expressly contract as agent. A man cannot enter into a contract in his own name and later shift it on to a third party.
2. The act to be ratified must be a lawful one. There can be no ratification of an illegal act or an act which is void.
3. Ratification must be made within a reasonable time.
4. No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.—Sec. 198.
5. Ratification must be of the whole contract. There cannot be partial ratification and partial rejection.—Sec. 199.
6. For valid ratification, the agent must have a principal who is in actual existence at the time of the contract.

Example—a company cannot ratify a contract entered into by a promoter on its behalf before the company came into existence by incorporation.

7. The principal must have contractual capacity at the date of the contract and at the date of the ratification.
8. Ratification is not valid where the effect of ratification is to subject a third person to damages or of terminating any right or interest of a third person.—Sec. 200.

Examples :

- (i) *A*, not being authorised thereto by *B*, demands on behalf of *B*, the delivery of a chattel, the property of *B*, from *C* who is in possession of it. This demand cannot be ratified by *B*, so as to make *C* liable for damages for his refusal to deliver.
- (ii) *A* holds a lease from *B*, terminable on three months' notice. *C*, an unauthorised person, gives notice of termination to *A*. The notice cannot be ratified by *B*, so as to be binding on *A*.

AGENT'S AUTHORITY

Express and implied authority

"The authority of an agent may be expressed or implied."—Sec. 186.

The authority is said to be express when it is given by words spoken or written. The authority is said to be implied when it is to be inferred from the circumstances of the case. The inference as to implied authority, may be drawn from things spoken or written, or the ordinary course of dealing between the parties and others.—Sec. 187.

Example :

A owns a shop in Serampur, living himself in Calcutta, and visiting the shop occasionally. The shop is managed by *B*, and he is in the habit of ordering goods from *C* in the name of *A* for the purposes of the shop, and of paying for them out of *A*'s funds with *A*'s knowledge, *B* has an implied authority from *A* to order goods from *C* in the name of *A* for the purposes of the shop.

Extent of agent's authority

"An agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act.

An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business."—Sec. 188.

Examples :

- (a) *A* is employed by *B*, residing in London, to recover at Bombay a debt due to *B*. *A* may adopt any legal process necessary for the purpose of recovering the debt and may give a valid discharge for the same.
- (b) *A* constitutes *B* his agent to carry on his business of a ship-builder. *B* may purchase timber and other materials, and hire workmen, for the purpose of carrying on the business.

Authority in an emergency

"An agent has authority, in an emergency to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances."—Sec. 189.

Examples :

- (a) An agent for sale may have goods repaired if it be necessary.
- (b) *A* consigns provisions to *B* at Calcutta with directions to send them immediately to *C* at Cuttack. *B* may sell the provisions at Calcutta, if they will not bear the journey to Cuttack without spoiling.

What happens when the agent exceeds his authority ?

When the authority is separable : "When an agent does more than he is authorized to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority, is binding as between him and his principal."—Sec. 227.

Example :

A, being owner of a ship and cargo, authorizes *B* to procure an insurance for 4,000 rupees on the ship. *B* procures a policy for 4,000 rupees on the ship, and another for the like sum on the cargo. *A* is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

When the authority cannot be separated : "Where an agent does more than he is authorized to do and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognize the transaction."—Sec. 228.

Example :

A authorizes *B* to buy 500 sheep for him. *B* buys 500 sheep and 200 lambs for one sum of 6,000 rupees. *A* may repudiate the whole transaction.

When the principal is bound by unauthorized acts of agent.
 The principal may be bound by unauthorized acts of the agent in two cases : (i) Where by the rule of estoppel the principal is precluded from denying the authority of the agent. (See cases cited under "Agency by Estoppel", p. 179.) (ii) Where an agency has been terminated, but notice of termination has not been received by the other parties concerned (See pp. 188-189)

Effects of notice to agent or information obtained by agent

Any notice given to or information obtained by the agent (provided it be given or obtained in the course of the business transacted by him for the principal) shall have the same legal consequences as if it has been given to or obtained by the principal.—Sec. 229.

Examples :

- (a) *A* is employed by *B* to buy from *C* certain goods of which *C* is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, *A* learns that the goods really belonged to *D*, but *B* is ignorant of that fact. *B* is not entitled to set-off a debt owing to him from *C* against the price of the goods.
- (b) *A* is employed by *B* to buy from *C* goods of which *C* is the apparent owner, *A*, was before he was so employed, a servant of *C* and then learnt that the goods really belonged to *D*, but *B* is ignorant of that fact. In spite of the knowledge of his agent, *B* may set-off against the price of the goods a debt owing to him from *C*.

Representation as to Liability

When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, he cannot subsequently hold the agent liable on the contract. Similarly if a person induces the principal to act on the belief that the agent only will be held liable, he cannot afterwards hold the principal liable on the contract.—Sec. 234.

Pretended Agents

A person untruly representing himself to be the authorized agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he had incurred by so dealing.—Sec. 235.

A pretended agent has no authority to act as agent. When the other party to the contract suffers damage as a result of such want of authority, he can sue the agent for breach of warranty of authority. The pretended agent is liable to pay damages under the Law of Torts. The liability arises even when the agent acted innocently.

Example :

A firm of solicitors were instructed by a client to defend a suit. Subsequently the client became insane (and the solicitors' authority as agent terminated by law). The solicitors in ignorance of the fact took steps to defend the suits. Held, the solicitors were personally liable for the cost of the other side, as on a breach of warranty of authority. *Yonge v. Toynbee*.¹

A person with whom a contract has been entered into in the character of agent, is not entitled to require the performance of it if he was in reality acting, not as agent, but on his own account.—Sec. 236.

Misrepresentation and Fraud by Agents

Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals.

But misrepresentations made, or frauds committed, by agents, in matters which do not fall within their authority, do not affect their principals.—Sec. 238.

Examples :

- (i) *A*, being *B*'s agent for the sale of goods, induces *C* to buy them by a misrepresentation, which he was not authorised by *B* to make. The contract is voidable, as between *B* and *C*, at the option of *C*.
- (ii) *A*, the captain of *B*'s ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between *B* and the pretended consignor.
- (iii) A solicitor's managing clerk had authority to transact conveyancing business on behalf of his employer. He induced a client, who was an old lady, to sign a conveyance of her properties to himself. With the help of the document the clerk sold the properties to another and decamped with the proceeds. Held, that as the clerk was acting in course of the business of the solicitor, the solicitor must make good the loss of the lady. *Lloyd v. Grace Smith & Co.*²

¹ (1910) 1 K.B. 215

² (1912) A.C. 716

 SUB-AGENT AND CO-AGENT**Rule**

The general rule is that an agent cannot appoint an agent. ("*Delegatus non potest delegare.*") "An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally."—Sec. 190.

Exceptions

But there are two exceptions to this rule. An agent can appoint an agent (i) when it is permitted by the custom of the trade with which the agency is concerned; and (ii) when it is necessary because of the nature of the agency.

Sub-agent

An agent appointed by an agent is called a sub-agent. "A sub-agent is a person employed by, and acting under the control of, the original agent in the business of the agency."—Sec. 191.

The consequences of the appointment of a sub-agent are stated below :

1. A sub-agent is appointed by and acts under the control of the original agent.—Sec. 191.
2. The principal is represented by the sub-agent and is bound by and responsible for his acts as if he was an agent appointed by the principal.—Sec. 192.
3. The agent is responsible to the principal for the acts of the sub-agent.—Sec. 192.
4. The sub-agent is responsible for his acts to the agent. The sub-agent is not responsible to the principal except in case of fraud and wilful wrong.—Sec. 192.
5. Where an agent improperly appoints a sub-agent, the agent is responsible for his acts both to the principal and to third parties. The principal in such cases is not represented by the sub-agent nor is he responsible for the acts of the sub-agent.—Sec. 193.

Co-agent

A co-agent is a person appointed by the agent according to the express or implied authority of the principal, to act *on behalf of the principal* in the business of the agency.—Sec. 194.

Such a person is an agent of the principal and is responsible to him. A co-agent is sometimes called a Substituted Agent.

In case of a co-agent there is direct privity of contract between the principal and the co-agent. There is no direct privity of contract between the principal and the sub-agent, except in cases of fraud and wilful wrong-doing.

Examples :

- (i) *A* directs *B*, his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. *B* names *C*, an auctioneer, to conduct the sale. *C* is not a sub-agent, but is *A*'s agent for the conduct of the sale.
- (ii) *A* authorizes *B* a merchant in Calcutta to recover the moneys due to *A* from *C & Co.* *B* instructs *D* a solicitor, to take legal proceedings against *C & Co.* for the recovery of the money. *D* is not a sub-agent but is solicitor for *A*.

An agent in appointing a co-agent must exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case. If he does this he is not responsible to the principal for acts of negligence of the co-agent.—Sec. 195.

Examples :

- (i) *A* instructs *B*, a merchant, to buy a ship for him. *B* employs a ship surveyor of good reputation to choose a ship for *A*. The surveyor makes the choice negligently and the ship turns out to be unseaworthy and is lost. *B* is not, but the surveyor is, responsible to *A*.
- (ii) *A* consigns goods to *B*, a merchant for sale. *B* in due course, employs an auctioneer in good credit to sell the goods of *A* and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. *B* is not responsible to *A* for the proceeds.

TERMINATION OF AGENCY

An agency may be terminated by *act of parties or by operation of law*. The different possible circumstances leading to the termination of agency are enumerated below.—Sections 201-210.

Termination by act of parties

Revocation and Renunciation : The principal may, by notice, revoke the authority of the agent. The agent may similarly, by notice, renounce the business of agency.

Revocation and renunciation can be express or may be implied from the conduct of the parties.

Example :

A empowers B to let A's house. Afterwards A lets it himself. There is an implied revocation of B's authority.

Compensation for revocation or renunciation : Where there is an express or implied agreement to continue the agency for any length of time, and the contract of agency is revoked or renounced without sufficient cause, compensation must be paid to the injured party.—Sec. 205.

Irrevocable agency : The principal cannot revoke the authority of the agent in the following cases :

1. When the agent has an interest in the subject-matter of the contract, his authority cannot be revoked so as to prejudice that interest. This is known as *agency coupled with interest*.—Sec. 202.

Examples :

- (i) *A gives authority to B to sell A's land to pay himself out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor can it be terminated by his insanity or death.*
- (ii) *A consigns 1000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself out of the price, the amount of his own advances. A cannot revoke this authority, nor is it terminated by his insanity or death.*

2. The authority of the agent cannot be revoked once it has been exercised so as to bind the principal.

3. When the agent has partially exercised his authority, the principal cannot by revocation affect the acts already done.

II. Termination by operation of Law

An agency may terminate by operation of law in any of the following ways :

1. **Efflux of time :** When the agency is for a fixed period of time, it terminates on the expiry of that time.

2. **Performance of the object :** Where the agency is for a particular object, it terminates when the object is accomplished or when the accomplishment becomes impossible.

3. **Determination of subject-matter.** When the subject-matter of the agency comes to an end, the agency terminates.

4. **Death or insanity of the principal or agent :** Death or insanity of the principal or the agent, terminates the agency. In case of a company, its winding up and in case of a firm, its dissolution has the same effect.

5. *Insolvency of the principal* : If the principal is adjudicated an insolvent, the agency terminates. But insolvency of the agent does not terminate the agency.

6. *The principal becoming an alien enemy* : If the principal and the agent belong to different countries and war breaks out between the two countries, the contract of agency is terminated.

7. *Termination of the sub-agent's authority* : The sub-agent's authority comes to an end when the agent's authority terminates.

When termination of agent's authority takes effect

The termination of the authority of an agent takes effect, as regards the agent from the time it becomes known to him. As regards third parties it becomes effective when it becomes known to them.—Sec. 208.

Examples :

- (i) *A* directs *B* to sell goods for him, and agrees to give *B* five per cent commission on the price fetched by the goods. *A* afterwards, by letter, revokes *B*'s authority, *B* after the letter is sent, but before he receives it, sells the goods for 100 rupees. The sale is binding on *A*, and *B* is entitled to five rupees as his commission.
- (ii) *A*, at Madras, by letter directs *B* to sell for him some cotton lying in a warehouse in Bombay, and afterwards by letter, revokes his authority to sell, and directs *B* to send the cotton to Madras. *B*, after receiving the second letter enters into a contract with *C*, who knows of the first letter, but not of the second, for the sale to him of the cotton. *C* pays *B* the money, with which *B* absconds. *B*'s payment is good as against *A*.
- (iii) *A* directs *B*, his agent, to pay certain money to *B*. *A* dies and *D* takes out probate to his will. *B* after *A*'s death but before hearing of it, pays the money to *C*. The payment is good as against *D*, the executor.

AGENT'S DUTIES TO PRINCIPALS

1. *Agent's duty in conducting principal's business* : An agent is bound to conduct the business of his principal according to the directions given by the principal, or, in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained he must make it good to his principal, and, if any profit accrues, he must account for it.—Sec. 211.

Examples :

- (a) *A*, an agent engaged in carrying on for *B* a business, in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, omits to make such investment. *A* must make good to *B* the interest usually obtained by such investments.
- (b) *B*, a broker, in whose business it is not the custom to sell on credit, sells goods of *A* on credit to *C*, whose credit at the time was very high. *C*, before payment, becomes insolvent. *B* must make good the loss to *A*.

2. *Skill and diligence required from agent* : An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business unless the principal has notice of his want of skill.

The agent is always bound to act with reasonable diligence, and to use such skill as he possesses ; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill or misconduct, but not in respect of loss or damages which are indirectly or remotely caused by such neglect, want of skill, or misconduct.—Sec. 212.

Examples :

- (a) *A*, a merchant in Calcutta, has an agent *B*, in London to whom a sum of money is paid on *A*'s account, with orders to remit. *B* retains the money for a considerable time. *A*, in consequence of not receiving, the money, becomes insolvent. *B* is liable for the money and interest from the day on which it ought to have been paid according to the usual rate, and for any further direct loss.—as e.g., by variation of rate of exchange—but not further.
- (b) *A*, an agent for the sale of goods, having authority to sell on credit, sells to *B* on credit, without making the proper and usual enquiries as to the solvency of *B*. *B*, at the time of such sale, is insolvent. *A* must make compensation to his principal in respect of any loss thereby sustained.
- (c) *A*, an insurance broker, employed by *B* to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the underwriters. *A* is bound to make good the loss to *B*.
- (d) *A*, a merchant in England, directs *B*, his agent at Bombay, who accepts the agency, to send him 100 bales of cotton by a certain ship. *B* having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival the price of cotton rises. *B* is bound to make good to *A* the profit which he might have made by the 100 bales of cotton at the time the ship arrived, but not any profit he might have made by the subsequent rise.

- (e) *K* employed *W* to sell a house. On 29th May *W* received an offer of £6,150 from *E* and communicated it to *K* who directed him to accept it "subject to contract". On 3rd June *D* offered £6,750 but this offer was not communicated to *K*. On 8th June a written contract was entered into between *K* and *E*. *K* sued *W* for breach of duty in not communicating *D*'s offer. Held, there was breach of duty and *W* was directed to pay to *K* the difference between the two prices. *Keppel v. Wheeler*.¹

3. *Agent's duty to render accounts* : An agent is bound to render proper accounts to his principal on demand, or periodically if so provided in the agreement.—Sec. 213.

4. *Agent's duty to communicate to principal* : It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions.—Sec. 214.

5. *Agent not to deal on his own account* : If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.—Sec. 215. The agent has a duty to avoid conflict of interest between the agent and the principal.

Examples :

- (a) *A* directs *B* to sell *A*'s estate. *B* buys the estate for himself in the name of *G*. *A*, on discovering that *B* has bought the estate for himself, may repudiate the sale, if he can show that *B* has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.
- (b) *A* directs *B* to sell *A*'s estate. *B*, on looking over the estate before selling it, finds a mine on the estate which is unknown to *A*. *B* informs *A* that he wishes to buy the estate for himself, but conceals the discovery of the mine. *A* allows *B* to buy, in ignorance of the existence of mine. *A*, on discovering that *B* knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.

6. *Principal to get benefit of agent's dealings* : If an agent, without the knowledge of his principal, deals in the business of the agency on his own account, instead of on account of his

¹ (1927) 1 K.B. 577

principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.—Sec. 216. The agent has a duty not to make secret profits.

Example :

A directs *B*, his agent, to buy a certain house for him. *B* tells *A* it cannot be brought, and buys the house for himself. *A* may, on discovering that *B* has brought the house, compel him to sell it to *A* at the price he gave for it.

(*A* Agent's duty to pay sums received for principal) The agent is bound to pay to his principal all sums received on his account after deducting therefrom his dues on account of remuneration and expenses.—Sec. 218.

8. *Principal's death or insanity* : When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.—Sec. 209.

9. *Miscellaneous* : The Agent has other duties also. The agent must give all information to the principal. He must not delegate his authority. He must avoid the clash between his duty and self-interest. He should be loyal to the principal. He must not set up an adverse title against the principal. He is not entitled to remuneration in certain circumstances.

PRINCIPAL'S DUTIES TO AGENT

1. *Agent to be indemnified against consequences of lawful acts* : The principal is bound to indemnify the agent against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.—Sec. 222.

Examples :

- (a) *B*, at Singapore, under instructions from *A* of Calcutta contracts with *C* to deliver certain goods to him. *A* does not send the goods to *B*, and *C* sues *B* for breach of contract. *B* informs *A* of the suit, and *A* authorised him to defend the suit. *B* defends the suit, and is compelled to pay damages and costs, and incurs expenses. *A* is liable to *B* for such damages, costs and expenses.
- (b) *B*, a broker at Calcutta, by the orders of *A*, a merchant there contracts with *C* for the purchase of 10 casks of oil for *A*. Afterwards *A* refuses to receive the oil, and *C* sues *B*. *B* informs *A*, who repudiates the contract altogether. *B*, defends, but unsuccessfully, and has to pay damages and costs and expenses. *A* is liable to *B* for such damages, costs and expenses.

2. *Agent to be indemnified against consequences of acts done in good faith* : Where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it causes an injury to the rights of third persons.—Sec. 223.

Examples :

- (a) *A*, a decree-holder and entitled to execution of *B*'s goods, requires the officer of the Court to seize certain goods, representing them to be the goods of *B*. The officer seizes the goods and is used by *C*, the true owner of the goods. *A* is liable to indemnify the officer for the sum which he is compelled to pay to *C*, in consequence of obeying *A*'s directions.
- (b) *B*, at the request of *A*, sells goods in the possession of *A*, but which *A* had not right to dispose of. *B* does not know this and hands over the proceeds of the sale to *A*. Afterwards *C*, the true owner of the goods, sues *B* and recovers the value of the goods and costs. *A* is liable to indemnify *B* for what he has been compelled to pay to *C* and for *B*'s own expenses.

3. *Non-liability for criminal acts* : But where one person employs another to do an act which is *criminal*, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act.—Sec. 224.

Examples :

- (a) *A* employs *B* to beat *C*, and agrees to indemnify him against all consequences of the act. *B* thereupon beats *C*, and has to pay damages to *C* for so doing. *A* is not liable to indemnify *B* for those damages.
- (b) *B*, the proprietor of a newspaper publishes, at *A*'s request, a libel upon *C* in the paper, and *A* agrees to indemnify *B* against the consequences of the publication, and all costs and damages of any action in respect thereof. *B* is sued by *C* and has to pay damages, and also incurs expenses. *A* is not liable to *B* upon the indemnity.

4. *Compensation for principal's neglect* : The principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill.—Sec. 225.

Example :

A employs *B* as a bricklayer in building a house and puts up the scaffolding himself. The scaffolding is unskilfully put up and *B* is in consequence hurt. *A* must make compensation to *B*.

PRINCIPAL'S RIGHTS

1. *Compensation* : The principal is entitled to compensation for any breach of duty by the agent.
2. *Agent's duties* : The agent's duties are the principal's rights.
3. *Revocation* : The principal can revoke the agent's authority, subject to certain conditions.

AGENT'S RIGHTS

1. *Enforcement of rights* : The agent can enforce all the duties of the principal. The principal's duties are the agent's rights.

2. *Agent's Right of Retainer* : An agent may retain, out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.—Sec. 217.

3. *When agent's remuneration becomes due* : In the absence of any special contract, the agent's remuneration does not become due until he has completed the act for which he was appointed agent. But an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may have been sold, or although the sale may be actually complete.—Sec. 219.

4. *Agent not entitled to remuneration for business misconducted* : An agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration in respect of that part of the business which he has misconducted.—Sec. 220.

Examples :

- (a) *A* employs *B* to recover Rs. 100,000 and to lay it out on good security. *B* recovers, Rs. 100,000 and lays out Rs. 90,000 on good security but lays out Rs. 10,000 on bad security whereby *A* loses Rs. 2,000. *B* is entitled to remuneration for recovering Rs. 100,000 and for investing Rs 90,000. He is not entitled to any remuneration for investing Rs. 10,000 and must make good the loss of Rs. 2,000 to *A*.
- (b) *A* employs *B* to recover Rs. 1,000 from *C*. Through *B*'s misconduct the money is not recovered. *B* is entitled to no remuneration for his services, and must make good the loss.

5. *Agent's Lien* : In the absence of any contract to the contrary, an agent is entitled to retain goods, papers and other

property, whether movable or immovable of the principal, received by him, until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him.—Sec. 221.

PERSONAL RESPONSIBILITY OF AGENT

It is provided by Section 230 that, in the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

But if there is an agreement to that effect, express or implied, the agent may enforce the contract and may also be *personally liable* on it. Such a contract *shall be presumed to exist* in the following cases :

1. *Foreign principal* : Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad.
2. *Undisclosed principal* : Where the agent does not disclose the name of his principal.
3. *When principal cannot be sued* : Where the principal, though disclosed, cannot be sued (for example, if he is a foreign sovereign or a foreign State).

The agent is also personally responsible in the following cases :

4. *Fictitious person or a non-existent person* : If the principal does not exist. *Example* : When a promoter makes a contract for a company which has not yet been registered.
5. *Unauthorised Acts* : Agent acting beyond the principal's authority.—Secs. 227, 228. (p. 183)
6. *Misrepresentation or fraud by agent* : An agent is personally responsible if he makes misrepresentations or frauds acting in course of the business of the principal.—Sec. 238. (p. 185)
7. *Pretended agents* : A pretended agent does not have authority. When the other party to the contract suffers damage, he can sue the agent for breach of warranty of authority. The pretended agent is liable to pay damages under the Law of Torts. The liability arises even when the agent acted innocently.—Sec. 235.

8. *Representation as to liability* : If a person induces the principal to act on the belief that the agent only will be held liable, he cannot afterwards hold the principal liable on the contract.—Sec. 234.

Right of person dealing with agent personally liable : In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them liable.—Sec. 233.

CONTRACTS WITH AN UNDISCLOSED PRINCIPAL

An agent may enter into a contract with a person without disclosing the name of the principal. The legal consequences of contracts with undisclosed principal are as follows :

1. *Principal may require performance of the contract* : If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract. But the other contracting party has, as against the principal, the same right as he would have had as against the agent if the agent had been principal.—Sec. 231. (Para 1)

2. *Other party may refuse to fulfil the contract* : If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.—Sec. 231. (Para 2)

3. *Performance is subject to the rights and obligations between agent and the other party* : Where one man makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract.—Sec. 232.

Example :

A, who owes Rs. 500 to B, sells Rs. 1,000 worth of rice to B. A is acting as agent for C in the transaction, but B has no knowledge nor reasonable ground of suspicion that such is the case. C cannot compel B to take the rice without allowing him to set off A's debt.

4. *Agent is personally liable*. In contracts with an undisclosed principal, the agent is, in the absence of a contract to the contrary, personally liable on the contract. The other party

may hold either the agent or the principal or both liable.—
Sec. 233.

Example :

A enters into a contract with *B* to sell him 100 bales of cotton, and afterwards discovers that *B* was acting as agent for *C*. *A* may sue either *B* or *C*, or both, for the price of the cotton.

EXERCISES

1. In what ways an agency can be created ? (Pages 178-182)
2. What are the different ways an agency can be terminated ?
(Pages 187-189)
3. When is a Principal bound by the unauthorised acts of his Agent?
(Pages 182-183)
4. State the duties of the principal to his agent. (Pages 192-193)
5. State the duties of an agent to the principal. (Pages 189-192)
6. State the respective rights and duties of a principal and an agent, when the principal is undisclosed. (Pages 196-197)
7. Explain the instances when an agent can be made personally liable in respect of contracts entered into by him on behalf of the principal. (Pages 195-196)
8. Explain the following terms : (a) Principal (b) Agent (c) Power of Attorney (d) A Del Credere Agent (e) Sub-agent and Co-agent (f) Ratification (g) Agency of necessity.
(Pages (a) 174, (b) 174, (c) 174, (d) 178, (e) 186, (f) 180, (g) 180)
9. Distinguish between :
 - (i) Agent and Servant. (Page 175)
 - (ii) Agent and Contractor. (Page 176)
 - (iii) Agent and Bailee. (Page 176)
 - (iv) Express authority and Implied authority of agent. (Page 182)
 - (v) Sub-agent and Co-agent. (Page 186)
 - (vi) Agent and Pretended agent. (Page 184)
10. Objective questions. Give short answers.
 - (i) "An agent can be appointed orally." True or false ?
(Page 178)
 - (ii) State three varieties of agency contracts. (Page 177)
 - (iii) Give three examples of how agency can be created. (Page 178)
 - (iv) "The wife is not the agent of her husband". True or false ?
(Page 180)
 - (v) Give three examples of termination of agency. (Page 187)
 - (vi) "An agent is bound to render accounts to the principal." True or false ?
(Page 191)
 - (vii) Give two exceptions to the rule "an agent cannot appoint an agent".
(Page 186)